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AND

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CONVEYANCER'S NOTEBOOK

Lands Tribunal.—The Lands Tribunal Act, 1949, sets up a Lands Tribunal and a Lands Tribunal for Scotland to exercise jurisdiction (*inter alia*) in matters where the question would be referred under an Act to the official arbitrators under the Acquisition of Land Act, 1919, disputed compensation, etc., under the Lands Clauses Consol. Acts, the determination of development values by the Central Land Board under section 60 of the Town and Country Planning Act, 1947, and discharge and modification of restrictive covenants under section 84 of the Law of Property Act, 1925. It has also jurisdiction to act as arbitrator by consent. There is power to extend the jurisdiction by Order in Council: section 4.

The Tribunal is to be composed of a President, being a person who has held judicial office under the Crown or a barrister of seven years standing, and such number of members as the Lord Chancellor shall determine, being barristers or solicitors of the like standing or persons experienced in the valuation of land after consultation with the President of the Royal Institution of Chartered Surveyors. All appointments are to be made by the Lord Chancellor who determines, with the consent of the Treasury where necessary, the terms of appointment and who can remove a member whom he thinks has become unfit to hold office.

The Tribunal need not necessarily sit as a body. Its jurisdiction can be exercised by one or more of its members and this matter appears to lie with the President: section 3 (2). The decision of the Tribunal is final except that any person aggrieved may require a case stated for the Court of Appeal on a point of law: section 3 (4). The procedure is to be governed by Rules made under the Act and the rule-making authority is the Lord Chancellor: section 3 (11).

This Tribunal and its effect can only be seen after the rules have been made and some experience of its decisions are available. The very important point is that questions of law will be dealt with by the ordinary Courts notwithstanding the strong legal bias of the composition of the Tribunal. However, we have attempted here only to draw attention to the general character of the provisions of the Act.

Agriculture (Misc. Provisions) Act.—The Agriculture (Misc. Provisions) Act, 1949, is mainly concerned with the provision of schemes and powers to subsidise cattle rearing including subsidising grass and forage crop conservation. It includes provision for training persons above compulsory school age in agricultural occupations suitable to their age and capacity. There are, however, two sections more specifically of a landlord and tenant character. Section 9 confers upon any Minister who has requisitioned land for agricultural purposes the right to the compensation under the Agricultural Holdings Act, 1948 (or the Agriculture Act, 1947, s. 42), which he would have had by virtue of a tenancy and had given up possession at the end of the tenancy. These sums are payable into the Exchequer. Section 10 relates to small holdings as defined in Part IV of the Agriculture Act, 1947. The Agricultural Holdings Act, 1948, s. 11 (1) (giving the tenant full rights of disposal of produce and cropping of arable land), does not apply to these small holdings when the Minister has made a scheme under section 11 (4) (c) of the Act providing for the disposal of produce or provides other centralised services. Furthermore, by giving not less than one month's notice the Minister can determine his approval of a scheme on the ground that it is not being satisfactorily carried out and this will have the effect of making section 11 (1) apply to the small holdings.

Gifts to hospitals.—*Re Kellner's Will Trusts*, [1949] 2 All E. R. 43 (noted, *post*, p. 377) is noteworthy otherwise than for the law involved. Although we are not unaccustomed to judicial strictures upon the wording of Acts of Parliament we think it is unusual to find complicated provisions referred to as “a miracle of ineptitude” (*per* Harman, J., at p. 46). The case decided that legacies held on trust for teaching hospitals before the Appointed Day under the National Health Service Act, 1947, but not paid over could not be claimed by the new authorities governing those bodies, but were held applicable to charity *cy près*. It is important to note that this decision held that the teaching hospitals under the new regime are a different body from the teaching hospitals before the Appointed Day: see section 78 (1) (c) and section 11 (8). *Prima facie*, therefore, unless property vested or to be vested in them is covered by the Act, the trusts must fail. This may be even more significant with regard to the numerous legacies in wills of testators who have died or will die after the Appointed Day and whose will was executed before the Appointed Day. Here, again, it would seem that the hospitals cannot claim the legacy because the body to whom the legacy was given has ceased to exist. This is probably justice, because at least many testators would reconsider gifts to nationalised bodies appointed by the Minister of Health, or subject to control by regulation.

Although the Minister has appealed for continued charitable help for the hospitals and although hospitals have in the past been a popular form of bounty it is suggested that perhaps by no means all medical charities have fallen within the ambit of the Act. Furthermore, it seems at least probable that some of these, such as convalescent

homes, might fall within the designation of charity. Consequently, it could be argued that where a scheme is set up to administer a medical charity not falling within the Act the benefits should not accrue to institutions under the Ministry of Health but in favour of those medical charities still administered by "private" trustees.

But apart from all these technical considerations *Re Kellner's Will Trusts* (*supra*) is interesting as illustrating the modern tendency in these statutes to ignore the strictness with which our property law must be construed. We think that it is not unfair to say that all the big statutes dealing with the private law of property of recent years, whether it be by nationalisation, such as the Coal Act or the National Health Service Act, or by control, such as the Town and Country Planning Act or the Agriculture Act, tend to ignore the complexities of property law and treat the subject-matter from a physical rather than a legal standpoint. Since the land law in particular, but property law in general, has been steadily moving farther from the material into the realms of the notional for five or six hundred years it would seem desirable that either major reforms should be made directly and not indirectly or else that statutes should observe these complexities. It can scarcely be the function of legislative draftsmen to provide the litigating lawyer with a richer living.

Finance Act, 1949.—Attention may be drawn to the fact that the Finance Act, 1949, contains a number of provisions of specific interest to conveyancers. The King's Printers Copies were issued too late to deal with these topics in detail, but mention is made of their general character. Section 25 provides that borrowings against life policies shall, *in some circumstances*, be treated as income for the purposes of tax. Sections 27–33 reorganise the methods of death duties; they include the abolition of legacy and succession duty but increase the rate of estate duty in the larger estates. This provision applies to testators or intestates dying after the commencement of Part III of the Act. These provisions also contain a number of exemptions and allowances. Particularly attention may be called to the exemption of estate duty for gifts which do not in the aggregate to any one donee exceed £500 provided that it did not include any interest in settled property and bona fide possession was taken immediately by the donee. Stamp duties have also been affected: sections 34–36. These provisions are largely made by legislation by reference and difficult to state shortly. They include the general abolition of duties on the bonus issue of securities with exceptions and exemption for the purposes of the lower rate of duty in the Finance Act, 1910, s. 73, and Finance Act, 1947, s. 54, of any sale of "goods wares or merchandise" so far as concerns an instrument chargeable under the heading "conveyance or transfer on sale" save an actual conveyance or transfer of the "goods wares or merchandise". This is apparently to make a "certificate of value" valid notwithstanding a contemporaneous sale of chattels. Part V deals with Land Tax and in effect makes provisions for its disappearance either by exemption or compulsory redemption. These provisions are also complicated and require further notice.

Prevention of pests.—The Prevention of Damage by Pests Act, 1949, imposes obligations on *occupiers* to keep down rats and mice. By section 3 such an occupier of any land, not being agricultural land, must give notice to the local authority if it comes to his knowledge that rats or mice are living on or resorting to the land in "substantial numbers". Failure to give such notice is punishable summarily by £5 fine. The local authority may then serve notice on the owner or occupier requiring reasonable steps to be taken to keep down the pests: section 4. Failure enables the local authority to take the steps, charge the expenses and prosecute, the fine being £50 for first offence and any subsequent offence £100: section 5. The local authority can even specify any form of treatment and any structural repairs and the times at which treatment shall be carried out: section 4 (2). There are additional powers in certain cases, as where it is expedient to deal with land as one unit where it is in the occupation of different persons: section 6; and in respect of threshing: section 8. Section 9 entitles the local authority to require from occupiers and owners information concerning the interests of himself and other persons in the land. The Act also deals with infestation of food, but this does not appear to concern the landowner as such.

Chancery Division.—We have received the following notice from the office of the Chief Master.

The Lord Chancellor has made and given the following appointments and directions:—

1. Mr. Justice Romer, Mr. Justice Harman and Mr. Justice Danckwerts or one or more of them to be the Judges to exercise the jurisdiction in bankruptcy.
2. Mr. Justice Romer, Mr. Justice Harman and Mr. Justice Danckwerts to be the Judges for the hearing of causes or matters proceeding in the district registries of Liverpool and Manchester.

The following appointments and directions previously made will remain in force:—

1. Mr. Justice Wynn-Parry to be the Judge to whom references or disputes under section 29 of the Patents and Designs Act, 1907, as amended, are assigned.
2. Mr. Justice Wynn-Parry to be the Patents Appeal Tribunal under section 92A of the Patents and Designs Act, 1907.
3. Mr. Justice Vaisey to be the Judge for hearing appeals and petitions under section 92 (2) of the Patents and Designs Act, 1907, as amended, and Order 53A, rule 1.
4. Mr. Justice Vaisey to be the Judge for hearing proceedings under Order 55c (War Damage Act, 1943).
5. Mr. Justice Romer to be the Judge for the duties imposed by rule 15 (2) of the Public Trustee Rules, 1912.
6. Mr. Justice Vaisey, Mr. Justice Roxburgh and Mr. Justice Wynn-Parry or one or more of them to be the Judges by whom the jurisdiction of the High Court under the Companies Acts, 1929 and 1947, is to be exercised.

7. Mr. Justice Romer to be the Judge for the hearing of proceedings under Order 55A, rule 4 (Guardianship of Infants Acts, 1886 and 1925).
8. Mr. Justice Romer to be the single Judge for the purpose of hearing such appeals under Order 54D (Law of Property Acts, etc.) as are to be heard and determined by a single Judge; and Mr. Justice Romer and Mr. Justice Harman to be the two Judges constituting a Divisional Court for the purpose of hearing and determining such appeals under the same Order as according to the provisions of that Order are to be heard and determined by a Divisional Court of the Chancery Division.

In accordance with arrangements made between the Chancery Judges, Mr. Justice Danckwerts will hear proceedings under the Liabilities (War-time Adjustment) Acts, 1941 and 1944.

Matters assigned to Mr. Justice Vaisey, Mr. Justice Roxburgh or Mr. Justice Wynn-Parry will be designated "Group A", and those assigned to Mr. Justice Romer, Mr. Justice Harman or Mr. Justice Danckwerts "Group B".

LORD CHANCELLOR'S OFFICE,
HOUSE OF LORDS, S.W.1.
June 10, 1949.

We have received the following notice from the Chief Master (Chancery Division).

ADOPTION OF CHILDREN ACT, 1926

The attention of practitioners is called to the provisions of section 6 of the Adoption of Children (Regulation) Act, 1939, which came into force on June 1, 1943. This section applies where arrangements are made by a registered Adoption Society for the adoption of a child and regulates the time for applying to the Court for an Adoption Order. The effect of the section is that the application may not be made until the expiration of three months from the time when the child was delivered into the care and possession of the Adopter, but *must* be made within the following three months if the child has not been returned to the Society. Any person contravening this section is liable on conviction to fine or imprisonment or both.

The provisions of this section do not appear to be widely known to practitioners, and many applications are being made out of time.

THE HOUSING ACT, 1949

By J. F. GARNER, LL.M., Solicitor

This important statute, which came into operation on July 30, 1949, makes miscellaneous amendments in the law of housing, and also gives important new powers to local housing authorities, powers which will almost certainly affect the clients of many private practitioners. We are proposing here to summarise briefly those amendments which are of more general interest and then to discuss the more novel provisions of Part II of the new Act.

The removal of the reference to "working class" houses in most (but not all) of the more important sections of the Housing Act, 1936, now brings all houses, of whatever type, within the power of the local housing authority to secure their repair or demolition under section 9 or section 11 of the 1936 Act. The control over the permitted price and the permitted rent applicable to new houses constructed under licence issued under Defence Regulation 56A, introduced by the Building Materials and Housing Act, 1945, is continued in force for a further period of four years until December 20, 1953. Certain points of practical difficulty in this control have also been cleared by section 43 of the new Act (see, *e.g.*, *R. v. Edwards*, [1947] 1 All E. R. 314). The powers of a local authority to act as a building society are extended to cover houses of values as high as £5,000 (the previous limit was £1,500), and are also applied to the conversion, alteration, repair, improvement, etc., of houses, as well as their acquisition and construction (see section 44, amending the Small Dwellings Acquisition Acts, and section 4, replacing sections 91 and 92 of the 1936 Housing Act).

Two comparatively minor conflicts between housing law and the law of town and country planning are resolved by the new Act. As was pointed out by Mr. Walter in our contemporary, the *Journal of Planning Law* ([1949] J. P. L., at p. 374), it might have been possible for a building preservation order under section 29 of the Town and Country Planning Act, 1947, and a demolition order under section 11 of the Housing Act, 1936, to be in force in respect of the same house at the same time. This absurdity has now been removed by section 3 of the new Act, whereby in such a case (and in certain other circumstances) the local housing authority is required to make a closing order under section 12 of the 1936 Act, in lieu of the demolition order. Secondly, in order to further part of the general policy of the new Act to encourage the conversion of large houses into two or more separate dwellings, section 11 thereof provides that where development permission has been obtained under Part III of the Town and Country Planning Act, 1947, for any such conversion, the local county court is to have jurisdiction under section 163 of the Housing Act, 1936, to vary the terms of any lease, agreement, etc., in order that the conversion of the house into tenements, etc., may not be unlawful.

The private house owner will be most concerned with the provisions of Part II of the Act. These complicated sections provide, *inter alia*,

for the payment by local authorities to private individuals of "improvement grants"; somewhat similar to, but on a more permanent and extended basis than, the grants formerly payable under the Housing (Rural Workers) Acts.

These grants, which will not exceed one-half of the total estimated cost of the works as approved by the local authority, will be payable in respect of expenses incurred in:—

- (a) the provision of dwellings by means of the conversion of houses or other buildings, *or*
- (b) the improvement of dwellings.

Grants will be obtainable on application to the local authority, and in the case of land held under a settlement or trust for sale should, it seems, be treated as capital money (under whichever Part of the Third Schedule to the Settled Land Act, 1925, the improvements would fall). It should be noted, however, that the local authority have an absolute discretion whether or not to make a grant in response to a particular application. The application must contain full particulars of the proposed improvement works, and of the land on which they are to be carried out, and must be accompanied by plans and specifications of the works, and an estimate of the expenses to be incurred. The conditions under which an application for a grant may be considered under the Act may be summarised as follows:—

- (a) The authority must be satisfied that the dwellings to be provided or improved will provide satisfactory housing accommodation for a period of not less than thirty years;
- (b) the dwellings must comply with the requirements of the Minister of Health;
- (c) the applicant must have in every parcel of land an interest (not necessarily a legal estate) "constituting either an estate in fee simple absolute in possession or a term of years absolute whereof a period of not less than thirty years remains unexpired";
- (d) the estimated expenses to be incurred in respect of each dwelling to be so provided or improved must be not less than £100 or more than £600; there is provision, however, for the Minister of Health to prescribe other amounts for this purpose. Grants may be paid by way of a lump sum, or by way of instalments as the work proceeds, to a maximum of one-half of the total value of the work executed at any time.

Once a house has become the subject of an improvement grant under the Act, certain conditions will have to be observed with respect thereto, normally for a period of twenty years from the day on which the dwelling "first becomes fit for occupation after the completion of the improvement works". These conditions will be enforceable by way of injunction in the local county court at the instance of the landlord of the house as part of the terms of any lease, agreement for a lease or tenancy relating to the dwelling. It will be in the interest of the landlord so to enforce these conditions, for if a breach thereof occurs, he, as owner of the house for the time being (see definition of "owner" in section 36), will be liable to repay the improvement grant, with compound interest at the prescribed rate and with yearly rests, forthwith on demand by the local authority. It is therefore of importance that

a preliminary inquiry should in future be made by a prospective purchaser of his vendor before entering into a binding contract, as to whether an improvement grant has been paid under the Act in respect of the property proposed to be purchased. These conditions, the effect of which is discussed below, are made registrable in the local land charges register, but as the local authority are enabled to sue for the recovery of the grant on a demand therefor made consequent on a breach of a condition, and such demand may be served on any owner for the time being, it seems that the enforceability of these conditions against a purchaser of the land will be in no way vitiated by a failure to register them.

The conditions are to the effect that the dwelling may not be used for purposes other than as a private dwelling-house, except with the written consent of the local authority, that the rent to be charged may not exceed the maximum as provided for in the Act (this will normally be fixed by the local authority), and that all reasonable steps must be taken to secure the maintenance of the building so as the same shall be in all respects fit for human habitation. The most interesting condition, from the conveyancer's point of view, is, however, that providing that "the dwelling shall, at all times at which it is not occupied by the applicant for the improvement grant or a member of his family or a person to whom the interest of the applicant in the dwelling has been devised by him, be let or be kept available for letting at a rent" as provided for in the Act. This condition will have, it seems, some odd results in practice. Thus, the original owner, the applicant for the improvement grant, may sell the house during the twenty year period, but the purchaser thereof will not be able to reside there himself, although he will be able to select the tenant thereof (subject to the Rent Acts). Similarly, a person acquiring the house on the intestacy of the original owner (unless he is a member of the deceased's family, whatever that expression may mean in the present context—for the purposes of the Rent and Mortgage Interest Restrictions Act, 1920, s. 12, "family" was held to include brothers and sisters, in *Price v. Gould* (1930), 143 L. T. 333), will not be able to take up personal residence in the house, but a devisee from the original owner will be able to do so. If no tenant can be found for the property, presumably it may be occupied by the owner or any other person, provided it is "available" for immediate letting, at a rent within the prescribed maximum. It should also be noted that the premises must be available for letting; although a service tenant is given specific security of tenure under section 30, it seems that a mere service occupancy by leave and licence (a "tied cottage"), would not comply with the condition (see, e.g., *Ramsbottom v. Snelson*, [1948] 1 All E. R. 201).

IS THE PERMITTED USE A MATTER OF TITLE?

By P. COBBY

It has been laid down as a definite rule in a number of cases that on a sale of land the vendor must always disclose to the purchaser all matters affecting his title to the property: *Hyde v. Warden* (1877), 3 Ex. D. 72; *Reeve v. Berridge* (1888), 20 Q. B. D. 523. The question has therefore arisen as to what constitutes a matter of title, but it has never been answered satisfactorily. The cases are many and varied, but not one of them has a general definition of "a matter of title", each case being decided individually.

Connected with this, and adding to the general confusion there is another established principle, that on the sale of land there is, speaking generally, no warranty of its fitness for any particular purpose. Consequently, title must be disclosed, but quality need not.

Furthermore, a large number of the cases have turned on the right to specific performance. Here it has been rather a question of whether a defect should be disclosed or whether non-disclosure is immaterial. It has not, therefore, been laid down in so many words that the question is one of a matter of title.

It is suggested that the problem of title arises in one of two ways. First, if a vendor has contracted to sell something he must satisfy the purchaser that he has the right to sell it. Consequently, a purchaser objecting to a title may show that something material to the property sold has not been proved. A material defect will entitle the purchaser to refuse to complete unless the purchaser should know all about it. Secondly, a contract for the sale of land is sufficiently *uberrimæ fidei* to require the vendor to disclose those matters affecting the property sold which a purchaser cannot see for himself. In this category come all the matters which prove the vendor's right to convey as distinct from the character of the property conveyed. It is just here that the confusion is most complete. A fee simple in land subject to a right of way is property subject to a material defect. No one would deny that both the fee and the right of way were matters of title, and yet, as long as the right of way is visible, normally specific performance will be granted: *Ashburner v. Sewell*, [1891] 3 Ch. 505. The point is that the contract is to sell only the fee simple subject to the right of way—this is read into the contract because the way is apparent. On the other hand where there are material facts affecting the property which inspection does not show, it would seem that these are matters of title, because the property sold is not *ipso facto* subject to them.

An analysis of the cases, therefore, seems to show that a question is one of title if it is (a) material and (b) latent. If it complies with these requirements the vendor must satisfy the purchaser that he can convey what on the face of it the contract requires him to convey.

(a) MATTERS DECIDED NOT TO BE QUESTIONS OF TITLE

(1) *Not material.*

A defect will not be material if it does not prevent the property from being substantially the same as that which the purchaser thought he was getting according to the description coupled with inspection of the property.

In the following three cases the subsequent discoveries of sewers or pipes under the property conveyed were held not matters of title. In *Re Brewer and Hankins's Contract* (1890), 80 L. T. 127, Williams, L.J., said: "I think the purchaser here has got that property which was intended to be sold and bought and that the existence of the sewer does not so alter the character of the piece of land in question that the purchaser has the right to say: 'I do not get that which was intended to be sold to me'". In *Shepherd v. Croft*, [1911] 1 Ch. 521, there was a dictum in a similar strain and Maugham, J., in *Re Belcham and Gawley's Contract*, [1930] 1 Ch. 56, said: "The existence of the two sewers does not cause the property to be substantially different from that agreed to be sold".

In *Re Fawcett and Holmes*, 42 Ch. D. 150, considerable misdescription as to the area of the property sold was held by the Court of Appeal not to be a matter of title, the essence of the contract not being affected nor the substance of it materially altered.

In *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379, the Court had a very different matter to consider: namely, whether a resolution to make a town planning scheme under the Town Planning Act, 1925, was a matter of title. This resolution was not intended to affect the land directly, but was to act as a restriction on development unless and until the Town Planning Scheme was promulgated, and Eve, J., holding it not to be a question of title, said: "There is a potential interference with enjoyment, but until that potentiality has ripened into actual interference I cannot bring myself to hold that the property is affected in the sense that there is an incumbrance imposed on it by the mere passing of the resolution". His decision was approved by the Court of Appeal, where Lord Hanworth, M.R., said: "Is the resolution a restriction which affects the property so that the property which can now be conveyed is different from that property contracted to be sold? . . . I think Eve, J., was right in saying that there was nothing like an interference with the property which made it different from that which was contracted to be sold".

Another type of official notice, this time a requisition notice, was considered and decided not to be a matter of title in *Re Winslow Hall Estates Co. and United Glass Manufacturers, Ltd.*, [1941] 1 Ch. 503. The notice was served after the contract for sale, and the vendors still had possession at the date of completion. Bennett, J., in the course of his judgment said: "I am not going to decide what the position of the parties would have been if possession had been taken before the date fixed for completion or before the vendors were in a position to complete, since it appears from the evidence that on February 3, 1941, the vendors were in a position to hand to the purchaser a properly executed conveyance and to give them vacant possession of the property which they had contracted to sell".

It can therefore be seen clearly that each of the above cases has turned on the question : Is the vendor selling what he has contracted to sell? or expressing it differently : Is the fact concerned material to the property conveyed?

(2) *Those matters not title because not latent.*

Cases deciding this have been very infrequent but when they have occurred judges have been very decided in their judgments that if a matter is patent, *i.e.*, discoverable by the purchaser on reasonable inspection, then such a matter need not be disclosed as a question of title.

Thus in *Ashburner v. Sewell*, [1891] 3 Ch. 505, a case concerning a right of way over land, Chitty, J., said : " The general rule as to rights of way may be stated as follows, where it is obvious that there is a right of way enjoyed by some third persons or by the public in general the existence of such a right of way cannot give rise to any objection to the title, as for example if the estate sold is a large one with a public highway running through, the right in such a case is ' patent ' as opposed to ' latent ' ". Although this was only obiter, as he found in that case that the right of way was a latent one, it was stated in a very definite way and followed the authority of *Bowles v. Round* (1800), 5 Ves. 508, where the purchaser was refused a remedy because the right of way was a patent defect. The importance of deciding if a matter is patent or latent was emphasised by Malins, V.-C., in *Mawson v. Thacker*, L. R. 6 Ch. 91. There a culvert was found underground through which third parties had a right to the flow of water. Evidence showed that the mouth of the culvert was only visible at low water. Nevertheless the learned Vice-Chancellor held that the vendor was under no duty to disclose the existence, because, he said : " The purchaser here has had ample opportunity of examining the property for there was no concealment and he ought to have discovered this defect before he completed his purchase ".

Dicta in *Re Forsey and Hollebone's Contract* (*supra*) have given rise to the theory that the resolution was held not a defect in title, not only because it was not material, but also because, as it was registered as a local land charge, it was discoverable by the purchaser on searching and therefore was a patent defect. Thus the idea has grown that no matter registered as a local land charge need be disclosed by the vendor but this has not yet been either affirmed or disapproved.

(b) MATTERS DECIDED TO BE MATTERS OF TITLE

These may be divided into :—

- (1) Those where the matter has been expressed by the Judge to be both material and latent.
- (2) Those where the matter has been expressed to be material the fact of its being also latent being obvious on studying the facts.
- (3) Those where the fact has been held to be title because purely latent, materiality being obvious on studying the case.

(1) *Title because both material and latent.*

The most important case under this head and the one with the clearest judgment is *Carlish v. Salt*, [1906] 1 Ch. 335. It was concerned with the non-disclosure by the vendor of the existence of a party wall notice and the liability of the owner of the property concerned to contribute a proportion of the costs. Could the purchaser rescind the contract because of this non-disclosure? It was held that it was a matter of title which should have been disclosed and the purchaser could therefore rescind. In the course of his judgment Joyce, J., said: "I hold that the party wall notice and the award constituted a material fact affecting the price to be paid and in so far as they imposed a liability of uncertain amount at some future time on the owner of the premises, I am of the opinion that they constituted a latent defect not in the quality of but in the title to the property and ought to have been disclosed".

Another notice, this time a landlord's repair notice, was considered a defect in title for the same reasons as above in *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625; *Stevens v. Adamson*, 2 Stark. 422; *Beyfus v. Lodge*, [1925] 1 Ch. 350. In the last case Russell, J., said: "This appears to me a matter directly affecting the value of the property which was within the vendor's knowledge and the intending purchaser could not have ascertained and which it was the vendor's duty to disclose. . . . These were all matters material for the purchaser and all intending bidders to know to enable them to decide whether they should act at all and if so the amount to which they would be prepared to go".

(2) *Matters considered affecting title because material.*

The existence of easements over the land conveyed has always been considered to be a defect in title and the judgment of Knight Bruce, V.-C., in *Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609, shows the reason for the judges so deciding. "Now upon the contract and evidence my opinion is that by means of each of the deeds of 1816, 1820, and 1834 severally there exist material defects in title; that the easements or rights which they confer respectively on third persons affect the property prejudicially to a material extent".

Rights of third parties over the land, this time in the form of restrictive covenants affecting the land, have always been considered questions of title to be disclosed by the vendor. Examples of cases deciding this point are: *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515; *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 6 Q. B. D. 718; *Cato v. Thompson* (1882), 9 Q. B. D. 616; *Re Gloag and Miller's Contract* (1883), 23 Ch. D. 321; *Pemsel & Wilson v. Tucker*, [1907] 2 Ch. 191. In the last case Warrington, J., said: "I do not see how he can get over that objection, unless I were to hold, as of course we know it is impossible to hold, that a vendor makes a good title or an open contract where it appears that the property is subject to some restrictive stipulation, something which would entitle a third person to interfere with the free use which the purchaser may choose to make of the property which is the subject matter of the contract". It is to be noted that as since 1925 all restrictive covenants are now registrable the dicta in *Re Forsey and Hollebone's*

Contract (supra) that if a matter is registrable the vendor may not have to disclose it, may affect restrictive covenants created after 1925, but this has not been decided.

In the following three cases a part of the estate conveyed was actually in the ownership of some person other than the vendor. In *Edward v. M'Leay* (1815), G. Coop. 308, land was sold and it was subsequently discovered that the vendor was not entitled to a part of it, the same being an encroachment from a common. Grant, M.R., said: "If he (the vendor) knows of and conceals a fact material to the validity of the title and does not disclose the fact to the purchaser I am not aware of any principle by which relief can be refused to the purchaser". He held in that case that such a defect was such a fact material to the validity of the title.

Where land was crossed by a public drain and certain rights of way and there was an exception of mines and minerals in *McGrory v. Alderdales Estates Co.*, [1918] A. C. 503, it was held that these were defects in title. ✓

In *Pemsel and Wilson v. Tucker*, [1907] 2 Ch. 191, a sewer was discovered under the house and found to be vested in the local authority under section 13 of the Public Health Act, 1875. Warrington, J., said: "Here are rights which may seriously interfere with the enjoyment by the purchasers of what they have bought". It may be remembered that in *Re Brewer and Hankins's Contract (supra)* a sewer running underneath the property was held not a matter of title. In the later case of *Re Belcham and Gawley's Contract (supra)*, where the existence of two sewers was held not a question of title, *Re Pemsel and Wilson v. Tucker* was distinguished by Maugham, J., in this way: "The learned Judge held that there was a defect in the title, that the vendor had not made a good contract and accordingly that the local authority had rights in some part of that which he had agreed to sell and had also rights which might seriously interfere with the purchaser's enjoyment. The sewers in question passed actually under the house, and there was beneath the flagstone a manhole giving access to the drain. (In *Re Belcham and Gawley* the sewer ran along the east side of the premises and yard at the back.) The decision does not assist the Court in construing Condition 35 (a condition as to compensation) in the present case." It would seem therefore that the decisions turned on the questions of materiality to the property concerned.

The remainder of the cases held to be questions of title because material to the property are of a miscellaneous character and deal with matters of varied kinds. In *Edward v. Wickwar* (1865), L. R. 1 Eq. 68, underleases were considered as such and in *Allen v. Smith*, [1924] 2 Ch. 308; *Hyde v. Warden* (1877), 3 Ex. D. 72; *Reeve v. Berridge* (1888), 20 Q. B. D. 523, unusually onerous covenants in a lease were so considered. On the ground that the vendor had not the property or interest which he contracted to sell, Coleridge, J., held that the non-fulfilment of a covenant to insure rendering the property liable to forfeiture was a question of title in *Penniall v. Harborne* (1848), 17 L. J. Q. B. 94.

Lord Alverstone, M.R., in *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, held a notice to pave streets was a matter of title

because, "In the face of the agreed statement of facts I do not think it possible to hold that non-disclosure of the notice was immaterial".

The last of the miscellaneous cases of questions of title, all however having one common factor, *i.e.*, materiality to the subject matter of the sale, is *Caballero v. Henty* (1874), 9 Ch. App. 447. The conditions of sale of a public-house stated that the property was in the occupation of a tenant. The brewer who agreed to buy it afterwards learned that it was under a lease to another brewer for a term of which eight years were unexpired. James, L.J., holding that this was a material factor which should have been disclosed to the purchaser, said: "If there is anything in the nature of the tenancies which affects the property sold the vendor is bound to tell the purchaser and to let him know what it is which is being sold".

At the commencement of this article it was stated that it has always been a principle of our law that on the sale of land there is no warranty by the vendor of its fitness for a particular purpose. However, that principle has been qualified by the cases and after studying those hereinafter considered it will be seen that, if the property was expressly or impliedly represented by the vendor and purchased by the purchaser as being property suitable for a particular purpose, then the vendor must disclose as a matter of title anything affecting that suitability. This qualification has always been of considerable importance, but, as will be shown later, its importance has increased considerably since the passing of the Town and Country Planning Act, 1947.

The cases laying down this qualification commence with one decided in 1857. In *Denne v. Light* (1857), 8 De G. M. & G. 774, property was sold as arable land and it was later found that there was no right of access to the road. This was held to be a material defect for arable land and thus a defect in title.

This was followed in 1888 by the case of *Davis v. Cavey*, 40 Ch. D. 601. In that case there was a sale of leasehold business premises by auction. Later the purchaser discovered covenants restricting him from carrying on any trade or business and it was held that as the property was sold for business purposes the purchaser was entitled to have an assignment of property on which he could carry on such business and was entitled to a declaration that the title was not such as he ought to be compelled to accept.

This case was followed three years later by *Re Cox and Neve's Contract*, [1891] 2 Ch. 109, which carried the idea still further. There land was sold on the implication, not in express terms, that the purchaser wished to have it for building purposes and later there was discovered a covenant restricting the right of building on the property. North, J., after hearing the purchaser swear that if he had known it before he would have required the vendor to procure the release of the restriction, said: "I must therefore declare that the vendor has not made out a good title to the property".

In *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, the last of the cases to be considered under this head, the vendor represented the property to be suitable for the building desired to be done by the purchaser. Later it was discovered that there was an underground culvert for water running across the land which constituted a substantial drawback for building. Collins, M.R., said: "Under such a

state of facts, the purchaser may be considered as not having purchased the thing which was the subject of the sale”.

(3) *Matters held questions of title, being latent defects.*

Cook v. Taylor, [1942] 1 Ch. 349, is the only case to be considered under this head and it is submitted that the decision cannot be justified for this reason alone. It concerned the service of a requisition notice on the property to be conveyed as in *Re Winslow Hall Estates Co.* (*supra*), but in this case the council had taken possession before the date of completion. Simonds, J., after referring to a passage from *Williams on Vendor and Purchaser*, 4th ed., p. 201, in which it is stated that where land is sold impliedly with vacant possession then it has been decided that no tenancy must exist, said: “I may add that that appears to me to be commonsense, for it would be strange if, the vendor, saying nothing about the matter which lies within his knowledge and not within the knowledge of the purchaser, the purchaser were to find himself purchasing a property subject to a tenancy of which he could know nothing”. Thus, although the judgment only gave the fact of the notice being unknown to the purchaser as the reason for the decision, it is submitted that this alone is no ground for deciding the case against *Re Winslow Hall Estates Co., Ltd.* (*supra*). It seems that the obvious reason for this decision and point of distinction between the two cases is that in *Cook v. Taylor* the vendor could not sell with vacant possession whereas in *Re Winslow Hall Estates Co., Ltd.*, the vendor still had vacant possession, and this fact being material to the conveyance, and to the question whether the vendor was selling what he contracted to sell, made the requisition notice, together with the council taking possession, a question of title.

From all the above cases it is submitted that the clear principle emerges that for a matter to be a question of title it must have two characteristics, without which it will not be held by the Courts to be such. The defect must be so material that the purchaser can legitimately say: “I do not get that which was intended to be purchased by me”. In addition to this the matter must be latent as stated by Joyce, J., in *Carlsh v. Salt* (*supra*) and something which should be within the vendor’s knowledge. If a matter satisfies these requirements then whatever the nature of the defect itself, *i.e.*, whether a third party right, notice of liability for a certain purpose or the absence of a right, it will be considered a question which the vendor is bound to disclose to the purchaser.

(c) THE PERMITTED USE AS A MATTER OF TITLE

Since the passing of the Town and Country Planning Act, 1947, it has become essential to determine whether or not the “permitted use” is a question of title since in fact every purchaser is limited to this “use” subject to the right to obtain a planning permission to alter it, normally on payment of a development charge. Thus the existing use affects both the powers and the purse of the owner of any property.

On the submission above that a matter is a question of title if it is material and latent it is submitted that the permitted use is such a matter of title.

- (1) *Is the existing use material to the property sold so that it affects the question whether the vendor is conveying what he contracted to sell?*

On first surveying this question there appear to be two arguments against an affirmative answer.

(a) As has been said above, on a sale of land there is no implied warranty that the property is suited for the purpose for which it is desired to use it. Therefore, it might be argued, the purchaser cannot grumble if he finds that, owing to the existing use being what it is, he cannot make use of the land in the manner he desires without permission and payment of a development charge. He bought the land as it stood and the vendor was under no duty to disclose that the existing use was of such a nature that the purchaser would be subject to such restrictions.

However, the cases qualifying the general rule that there is no implied warranty must not be overlooked and the propositions laid down in them to the effect that if property is expressly or impliedly represented by the vendor and purchased by the purchaser as being suitable for a particular purpose than anything undisclosed by the vendor affecting that purpose is material and a question of title, must be remembered. On a sale of land today it is surely true to say that both parties know that the existing use can only be changed subject to restrictions, and it is therefore contended that on a sale of land it is impliedly agreed that the purchaser knows the existing use. It seems true to say this for the existing use is necessarily the most important point for his consideration as it affects many of his rights over the land. If this implied agreement is present then it will naturally follow that any matter connected with the existing use requires disclosure by the vendor as a question of title.

(b) A second argument which might be raised is that of the decision of *Re Forsey and Hollebone's Contract (supra)*. It will be remembered that that case was concerned with a resolution to make a town planning scheme. This was held not a matter of title because, according to Eve, J., "There is a potential interference with enjoyment but until that potentiality has ripened into actual interference I cannot bring myself to hold that the property is affected in the sense that there is an incumbrance imposed on it by the mere passing of the resolution". How different was that resolution from the "existing use". Firstly, it might not affect the property for many years and at the time of the conveyance affected no rights of the purchaser whereas the existing use immediately places restrictions on the use of the land conveyed. Secondly, the resolution was registered in that case and therefore the purchaser could have discovered it on reasonable inspection whereas, as will be shown below, the existing use is not patent. These two differences alone show how different in character are the two subjects.

Apart from these negative arguments it would also appear positively that the permitted use is material from a consideration of the significance attached to it by the Town and Country Planning Act, 1947. It makes all the difference to the purchaser and seems to fit in with the judgment of Joyce, J., regarding the party wall notice and liability to contribute to the costs by the owner of the property in

Carlish v. Salt (supra). "I hold that the party wall notice and the award constituted a material fact affecting the price to be paid and in so far as they imposed a liability of uncertain amount at some future time on the owner of the premises I am of the opinion that they constituted a latent defect not in the quality of but in the title to the property and ought to have been disclosed". It certainly seems that the nature of the existing use affects very definitely whether the owner will have to pay "a liability of uncertain amount at some future time" in the form of a development charge.

(2) *Is the existing use a latent matter?*

From a first view of the subject it would appear that an existing use is very obvious and therefore patent. It seems that nothing could be more patent than the use to which the land or property is at present being put. However, on studying the intricacies of the Act of 1947 it can be seen that the existing use is not purely the use of the property at the date of the contract or conveyance. Generally speaking, the existing use of property is either (1) the actual use on the Appointed Day or (2) the authorised use on that day which need not necessarily be the actual use; the existing use has continued as such apart from any specified permitted developments. Although the actual use is discoverable on inspection, yet there is always the doubt whether the *actual* use is the same as the *authorised* use, and there are also certain specific exceptions in the Act to the general rule above, which cloud the issue further.

(1) Thus it may be that such use originated from a contravention of some previous planning Act and by section 75 of the Act of 1947 such is liable to the same enforcement notices and liability to be charged by the authorities as if it was a contravention of the present Act.

(2) Section 12 (5) provides for any temporary uses to which the land has been put and for the resumption of the real and permanent use which is the statutory "existing use". Thus the purchaser, at the date of his purchase might, if he was not informed by a disclosure by the vendor, inspect the property and see the temporary use and later discover that the real permanent "existing use" of the property was entirely different. Unoccupied land is another difficulty and makes the value of inspection very small.

Consequently it appears that the "existing use" of the property is both material and latent and it therefore follows that it is a matter of title. As such it must be disclosed by the vendor under an open contract with such evidence as is available to satisfy a purchaser. This does not, however, determine the position in the event of the actual use proving to be something other than the use permitted by the Act. This raises a further question which requires separate treatment.

THE OAK AND THE ACORN

By J. G. FLEMING, M.A., D.Phil., Barrister-at-Law

In the adjustment of rights between tenant for life and remaindermen the distinction between capital and income is of paramount importance. The apportionment rules in *Howe v. Lord Dartmouth* and *Re Chesterfield's Trusts* do not specifically deal with the question whether any given payments for the benefit of the residuary estate of a deceased person represent receipts in the nature of capital or income, but with the further adjustment of income and capital receipts respectively. They operate on the basis of a preliminary determination of the nature of the payments which have come into the hands of the personal representatives to the intent that, for example, what has been received by them as income of a wasting asset must, in the absence of a contrary intention, be dealt with on the footing that for purposes of distribution part of such income is to be attributed to capital so as not to prejudice one beneficiary at the expense of another. Nonetheless, these rules are closely linked with the indispensable preliminary characterisation of the intrinsic nature of the moneys flowing into the estate because the principle of apportionment in *Howe v. Lord Dartmouth*, in respect of wasting assets and hazardous securities, can be applied solely on the footing that the interest of such assets is *prima facie* income, and has the effect of capitalising part of it for purposes of application to the trust, while conversely the apportionment under *Re Chesterfield's Trusts* presupposes the existence of assets received as capital (not yielding income at all) and operates so as to reduce that fund, when it falls in, by as much as is attributable to a reasonable rate of interest from the testator's death. The practical difference resulting from the application of either the one or the other of these rules is, of course, considerable and enhanced to an even greater extent where the obligation of apportionment itself is negated, because in the case of a capital receipt the tenant for life is only entitled, in such a case, to the interest on that sum after investment, while income receipts will be payable to him in specie. The initial ascertainment of the intrinsic nature of the payments may, however, be displaced as a consequence of an express or implied provision of the will, and instances are not wanting of directions by a testator to treat what is *prima facie* income on the footing that it constitutes capital, as, for example, in *Re Sullivan*, [1930] 1 Ch. 84, the provision to capitalise royalties deriving from copyrights in the works of the well-known composer, or conversely to apply a capital receipt as income. Such clause does not necessarily of itself also negative the relevant apportionment rules but would, where these are not excluded, have the effect of making it obligatory to resort to the rule in *Re Chesterfield's Trusts* in lieu of the principle in *Howe v. Lord Dartmouth*, and vice versa. Thus an analysis of the decisions to be presently considered must needs proceed by adverting both to the intrinsic nature of the respective payments and the application of the provisions in the relevant wills to them.

A series of relatively straightforward cases may be briefly disposed of. In *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643, mortgage debts and moneys payable under a life assurance policy, in *Re Flower* (1890), 62 L. T. 216, a true reversionary interest in property, and in *Re Morley*, [1895] 2 Ch. 738, a policy on the life of a third party were dealt with on the tacit assumption of falling into the residuary estate as capital payments, while the last case also posed for consideration the incidence of liability in respect of the premiums for its upkeep prior to maturity. These were all instances of lump sums due to the estate of the deceased and, without as much as raising an argument, regarded as capital receipts on falling into possession. On the other hand, in *Re Sullivan* (*supra*), Maugham, J., dealt with royalties on the basis of their representing income of a wasting asset and held that, by virtue of the widow's disclaimer of her life interest under the will, she was entitled to take as on intestacy with the result that the capitalisation clause of the will thereby became inoperative and the royalties payable to her as income. This conclusion was supported, though without acknowledgment, by the previous decision in *Re Evans' Will Trusts*, [1921] 2 Ch. 309 where the rule in *Howe v. Lord Dartmouth* had been applied to similar periodical payments, it being taken as apparently self-evident that they could not be regarded as capital receipts but were analogous to rents of a leasehold interest.

Periodical payments of a different nature occupied the attention of the Courts in *Re Fisher*, [1943] Ch. 377, and *Re Payne*, [1943] 2 All E. R. 675. In the former case, the deceased had entered into an assurance contract whereby, in the events which occurred, a sum of £50 was due immediately after his death, a further amount of £450 in 1958 and payments of £52 per annum until that date. Bennett, J., in a vigorous judgment, refuted the contention that the intermediate periodical sums were in the nature of income and gave expression to the picturesque formula which has since become a commonplace on issues of this kind:

"It is not possible to point to any property of which the intestate was possessed when he died and to predicate of the annual sums that they are income arising from that property since the intestate's death. There was not, and is not, any tree belonging to the intestate of which the annual payments are the fruits".

Moreover, the incidental fact that they were described in the policy as "income" did not alter their nature because "an oak is an oak, though for convention called an acorn". It will be observed that, on the facts of this case, it was well-nigh incontestable that the annual sums were, in their nature, indistinguishable from the initial and final payments under the policy, and were not susceptible of being rationalised as "interest" on the lump payment of £450 which was due as a capital receipt sixteen years after the intestate's death. The legal position was, therefore, closely analogous to that in *Re Morley* (*supra*), and did not occasion exceptional difficulty. Within a few weeks of that decision, the late Lord Uthwatt, in *Re Payne* (*supra*), held that, where a testator under a service agreement with a company was entitled to a fixed monthly salary which was to continue for six months after his death and a certain percentage of the profits for five years following

his decease, these sums did not fall within the description of "a life interest in and the use and enjoyment of all my property whatsoever and the beneficial ownership of the income arising therefrom" in his residuary estate which the testator had bequeathed to his widow for life with remainder in certain proportions to his brothers and sisters. The fact that these sums could not be attributed to any fund or property from which they might be said to flow as produce into the estate would seem to have been sufficient to dispose of the argument that they represented income. The learned Judge was indeed careful to base his conclusion entirely on the construction of the words "income derived from my estate" in deciding that the relevant payments were part of the estate itself and not income of it, with the result that they fell to be apportioned on the principle in *Re Chesterfield's Trusts*. The brief judgment does, however, contain a veiled suggestion, not necessary to the decision, that periodical payments which derive from a fund not itself part of the residuary estate do not, in the absence of a contrary intention to be gathered from the language of the will, devolve as income but represent capital. At least, this interpretation commended itself to Cohen, J., in *Re Hey's Settlement and Will Trusts*, [1945] 1 All E. R. 618, and gave a new lease of life to certain isolated decisions which, there was good ground to believe, had for some time been allowed to erode in oblivion by reason of their irreconcilability with a substantial line of creditable parallel authority.

In *Re Hey* the testator had directed his trustees to pay the income of his "residuary trust fund" to his widow for life with remainder as to both capital and income to his children, and empowered them to retain the fund unconverted for so long as they in their absolute discretion shall think fit notwithstanding that it might be of a wasting, speculative or reversionary nature, and pending such conversion to apply the income "properly attributable in the opinion of my trustees to income of property actually producing income" as income, and expressly negatived the rules in *Howe v. Lord Dartmouth* and *Allhusen v. Whittell* in all their branches. In his lifetime the testator had created a settled fund, the income of which, during the life of his widow, resulted to his residuary estate. The gist of the decision that this income was to be distributed as capital under the will is enshrined in the following passage of the judgment:

"Counsel for the testator's widow admits that, if he is to succeed, he must satisfy me that the income of the settled fund which is payable to the testator's executors . . . is income of property forming part of the testator's estate. When asked: 'What property?' he said that the property is an estate *pur autre vie* and that the payments which the testator's executors would from time to time receive out of the income of the settled fund would be income arising from that property. This argument is, at first sight, attractive, but . . . I should have said that it was specious, for it seems to me that, although it is true that the payments are income of a fund, they are income of the settled fund, and not of any property forming part of the estate, and that, on the contrary, in the aggregate they constitute an asset of the testator's estate".

The learned Judge's reliance on the above-cited passage from the judgment in *Re Fisher* clearly points to his refusal to concede that the words "any property of which the (deceased) was possessed" were capable of applying to such interests as terminable annuities or estates *pur autre vie* on the ground that the income from such a source flows from a fund which is not itself part of the residuary estate. It is respectfully submitted, however, that a careful analysis of that formula and of the relation between its application to the issue in *Re Hey*, on the one hand, and the analogous position of leasehold interests, on the other, expose the correctness of that decision to considerable doubt.

The use of the phrase "possession of property" is not a happy choice of terminology, though justifiable by reason of its regrettable prevalence in the current legal vocabulary; but the danger of a loose and inaccurate term becomes immediately apparent when deductions are drawn from it without advertence to the true meaning which it was originally intended to convey. "Property" is not a tangible object in law, but a right. A man may be possessed of land or a chattel but, strictly speaking, the owner of a freehold or leasehold does not "possess property"; he is entitled to an interest or right in the land. The distinction between a physical object and the juristic relationship to that object compels us to attach to the words "property" in the passage of Mr. Justice Bennett's judgment the more precise significance of "rights of a proprietary nature to which the deceased was entitled". Thus given its correct meaning, it is not easy to apprehend the distinction, if there be any, between the right to a terminable annuity in a settled fund and a leasehold interest. Both are of a terminable nature and, therefore, wasting assets, and both yield periodical produce issuing, as it were, from a tree. It is, of course, true that a leasehold interest confers an estate in and often a right to possession of the land demised, but in respect of the tenant's claim to the rents and profits during the term, the nature of his right is, in our submission, indistinguishable from that of a person entitled to a terminable annuity or shares in a company owning wasting assets. Yet, the proposition has never been advanced that the rents of a leasehold estate which is part of residue must be distributed on the footing that they represent capital receipts and ought, *prima facie*, to be apportioned on the principle of *Re Chesterfield's Trusts*, and it has already been observed that, on good authority, the same principle applies to royalties derived from copyrights. This patent analogy, however, does not appear to have been presented to the Court in *Re Hey*, and the resulting decision, if correct, almost points to the acceptance of a peculiar distinction between income derived from a "purely incorporeal right" and income from a right which is figuratively associated with corporeal possession.

This view of the matter might also explain the extraordinary fact that in a number of decisions it has been consistently assumed, and evidently accepted, as unarguable that long annuities are property of a wasting nature, the sole issue in those cases being whether the dividends ought to be apportioned under the rule in *Howe v. Dartmouth*, or were payable to the tenant for life in specie. (See *Alcock v. Slopers* (1833), 2 My. & K. 699, *Porter v. Baddeley* (1877), 5 Ch. D.

542, *Tickner v. Old* (1874), 18 Eq. 422, *Wilday v. Sandys* (1869), 7 Eq. 455, etc.) The question lies near whether it was merely due to an oversight that these decisions were not favoured with citation on the few occasions on which the issue was canvassed as to the intrinsic nature of payments in respect of terminable settled annuities. These so-called long annuities are interests in public funds which enjoyed a considerable popularity during the nineteenth century as a means of reducing the National Debt. Instead of lasting until the capital which they represent can be paid off en bloc, an annual charge of a larger amount than ordinary interest is substituted but subsisting only for a shorter term. Though, of course, not authorised trust investments, their similarity to ordinary securities yielding dividends may have been thought too close to permit a challenge of the seemingly general conviction that they were property producing income which was distributable as such to the tenant for life. Yet it is difficult to elicit their distinguishing criterion from terminable annuities under a settlement or, for that matter, from estates *pur autre vie*, in respect of the nature of the income derived from these sources. Indeed, if any differentiation is conceivable, it is rather the other way because long annuities are more particularly calculated so as to pay off, during their subsistence, the capital which they replace with interest. Consequently, the intrinsic nature of the periodical dividends flavours strongly of capital repayments, but notwithstanding this undeniable feature it has not been questioned that they are to be treated as representing income for purposes of distribution to persons entitled to residue in succession.

The view propounded in *Re Hey* does not altogether lack support from earlier judicial pronouncements, and the learned Judge was able to cite two prior decisions which appeared to fortify his conclusion. In *Crawley v. Crawley* (1835), 7 Sim. 427, where a testatrix was entitled to a redeemable annuity which had been granted to her for sixty years and formed part of her residuary estate, it was held by Sir L. Shadwell, V.C., that her executors must, until sale, invest the periodical payments and pay only the interest thereon to the tenant for life. The brief and inadequately reported judgment does not elucidate the question why, even assuming the payments to be in the nature of capital receipts, they were not further apportioned in accordance with the suggestion by Lord Eldon in *Howe v. Lord Dartmouth*, on the principle of calculation which came to be finally settled by Chitty, J., in *Re Chesterfield's Trusts*. Nor does the report contain reference to any previous decision but gives the impression of the case being regarded as *primæ impressionis*. It is, however, at first sight inconsistent with *Alcock v. Slopers* (1833), 2 My. & K. 699, which apparently was not cited to the Court and, indeed, failed to be drawn into the controversy on subsequent occasions. In that case, a testator left his residue to persons in succession, with the direction that his widow should receive the rents, profits and dividends during her life, and that the executors should sell his freehold and leasehold houses on her death. His residuary estate compromised, *inter alia*, long annuities with reference to which Sir J. Leach, M.R., held that, since the will in terms postponed the duty of conversion until after the death of the tenant for life, she was entitled to the dividends in specie. The fact that the annuities were not specifically mentioned as the subject of

conversion was immaterial because the tenor of the will disclosed a clear intention that the tenant for life should receive the actual income, more particularly because the reference to "dividends" could, in the circumstances, only apply to the long annuities. This decision is unambiguous authority that the periodical payments in respect of the annuity were income. The contention may perhaps be advanced that the language of the will not only negated the rule of apportionment in *Howe v. Lord Dartmouth*, but was also sufficiently explicit to be taken as a direction to treat the payments, which—it might be argued—were *prima facie* capital receipts, as income on the ground that, in the absence of any property other than the long annuities to which the term "dividends" could apply, the testator had intended his widow to enjoy them as if they represented income (cf. *Neville v. Fortescue* (1848), 16 Sim. 333). This interpretation is not, however, fairly permissible by reason of the absence of any argument directed to this point, and is contradicted by the underlying assumption of the judgment that the annuities constituted a wasting capital asset and that the dividends were *in any case* payable on the footing of income.

The learned Vice-Chancellor in *Crawley v. Crawley*, was also confronted with two additional issues. He held that the interest of a fund which under the will had been set aside to answer certain contingent legacies was, until the occurrence of the contingency, part of the income of the residuary estate. This order was subsequently followed in *Cranley v. Dixon* (1857), 23 Beav. 512, and *Allhusen v. Whittell* (1867), L. R. 4 Eq. 295, and applied in *Re Whitehead*, [1894] 1 Ch. 678, to surplus dividends on a fund of Consols earmarked to answer a conditional legacy. The third proposition, established by Sir L. Shadwell, was that interest of a legacy which was directed to be accumulated beyond the legally permissible period and the accumulations thereafter until the time of payment were part of the capital of residue. After some judicial conflict, that decision must now be regarded as discredited and it appears to be the better view that such interest is distributable as income: *Re Hawkins*, [1916] 2 Ch. 570, *Re Garside*, [1919] 1 Ch. 132, not following *Re Pope*, [1901] 1 Ch. 64. Although this problem displays features which are peculiar to itself, it makes the conclusion of the Court in *Re Hey* difficult to sustain that, as a general proposition, in order to ascertain whether income of a fund is income or capital for distribution to persons interested in residue, a distinction must be observed between a contingent legacy fund which is itself part of the residuary estate and a sum set aside to answer vested but not presently payable legacies which is not, and that the interest on the former must be dealt with by the executors as income and the interest on the latter as capital. This suggestion was in fact advanced in the case of *Re Whitehead* (*supra*), on which Cohen, J., not unnaturally relied as his principal support. There the first testatrix T. gave a life interest in her residuary estate to the second testatrix W. with a general testamentary power of appointment. The estate comprised (i) a fund earmarked to answer certain legacies under her will which had vested in the legatees on her death but were not payable until they reached the age of twenty-five, and did not carry intermediate income, and (ii) Consols set aside to provide an annuity payable to her son at the discretion of the trustees. The second testatrix in the exercise of her power of

appointment directed the residue of her own estate to be held for a tenant for life and remaindermen, and empowered the trustees to retain the estate in its actual state of investment as at her death. Stirling, J., took the view that a differentiation between a contingent and a vested legacy fund was warranted, and that he must treat the instant case as if W. had been entitled simply to a terminable annuity for a like amount as the income of the fund set apart to provide for the vested legacies. He held that, applying the rule adopted in *Crawley v. Crawley*, the income which accrued on the fund until the legatees attained twenty-five must be dealt with as capital and invested, and that the tenant for life under the second testatrix's will was entitled only to the income arising from the investments. Moreover, the direction to the trustees empowering them to retain the estate in its present state of investment did not evince an intention that the tenant for life should receive this income as income, whereas, in contrast, the surplus income of the conditional annuity fund was payable as such and need not be capitalised. Commenting on this decision, Cohen, J., emphasised the differentiation between the two funds and remarked: "The Consols formed part of the testator's estate; the fund from which the income arose did not" (at p. 625). In *Re Hawkins (supra)*, Sargant, J., was pressed to follow this precedent and to hold that interest of a legacy directed to be accumulated beyond the period permitted by Thellusson's Act formed part of the capital of the residue, but refused to accede to this contention, and evidently did not view *Re Whitehead* with unqualified approval. He attempted to distinguish that decision on the ground that there the fund was part of the estate of the first testatrix, and question to be decided was the intrinsic nature of the payments received by the executors under W.'s will, but it seems clear that Stirling, J., did not rest his conclusion on that narrow ground, since the same observation is apposite to the conditional legacy fund, and purported to establish a proposition of wider significance. His sole support being derived from *Crawley v. Crawley*, the doubts as to the correctness of that decision equally attach to *Re Whitehead* itself.

It must be admitted that the preceding exposition might not necessarily justify the conclusion that, despite their questionable premises, these cases are bad law, if it were not for the existence of several more recent judicial authorities in one of which they were ignored and in the other repudiated by clear implication. In *Re Sherry*, [1913] 2 Ch. 508, the will provided that the income from the residuary estate shall be paid to and applied to the person or persons, and in the manner to whom and in which the income of the proceeds of the residuary estate would for the time being be payable. The residue included an interest in the nature of an estate *pur autre vie* in certain funds which, *ex hypothesi*, were not themselves part of the residuary estate itself. The remaindermen did not evidently presume to contend that the payments in respect of that terminable interest were other than income and distributable as such, but confined their endeavour to show that in fairness the premiums on certain insurance policies should be defrayed out of income since the tenant for life was admittedly entitled to the whole of the income of the life interest. In this attempt they did not succeed on the ground that the premiums were payable for the preservation of an item of the testator's property, the benefit of which would

enure to capital and was, therefore, an expense in the administration of the estate. (See also *Re Morley*, [1895] 2 Ch. 738.) Although the decision on the point now under discussion proceeded *sub silentio*, Mr Justice Warrington's order clearly implies that income of a fund which is not itself part of the residue does not cease to be income for purposes of distribution, provided that the testator had a right, albeit of a terminable nature, to receive the periodical produce of it. *Re O'Hagan*, [1932] W. N. 188, is even clearer authority to this intent. The will directed that the income arising from the estate shall be applied in the same manner as if it were income of the proceeds of sale. The residue included income from a fund created by a post-nuptial settlement which resulted to the testator's estate by reason of an invalid disposition for accumulation beyond his death until the decease or remarriage of his wife. Thus the situation was not unlike that dealt with in *Re Hawkins* (*supra*), with the distinguishing feature that here the income issued from a fund not created by the will itself but arising *aliunde*. Notwithstanding the citation of *Crawley v. Crawley*, and *Re Whitehead*, Clauson, J., observed that "it was well-settled that a terminable annuity ought to be treated as property which, though terminable, was to be treated as part of the testator's estate producing income, and it was difficult to differentiate the interest in question from a terminable annuity", and held that in view of the provision in the will the tenant for life was entitled to the income in specie without apportionment. Mr. Justice Clauson's categorical statement appeared a little puzzling to the Court in *Re Hey*, but, as the writer hopes to have shown, rests on sound authority and good reason.

Lord Uthwatt in *Re Payne* (*supra*), noted the difficulty presented by the apparently irreconcilable decisions in *Crawley v. Crawley*, and *Re Whitehead*, on the one hand, and *Re Sherry* and *Re O'Hagan*, on the other, but suggested the tentative solution that it was possible "to arrive at the conclusion that, upon the true construction of a common form trust for sale and a common form power to postpone conversion, the phrase 'income of my estate' in those clauses means 'income which happens to be part of my estate' and not 'income derived from my estate'". This view, however, would not altogether dispose of some of the decisions previously referred to which were not before the Court on that occasion, and it was rejected as untenable in *Re Hey*. An even less plausible attempt to bridge the impassable gap was that advanced by Williams, J., in *Michael v. Callil* (1945), 72 C. L. R. 509, 539, who saw the reason why the tenants for life were entitled to the income in *Alcock v. Slopers*, *Re O'Hagan* and *Re Sherry*, in the fact that in the first case there was no immediate trust for conversion so that the tenant for life was entitled to the income of the residuary estate, and therefore to the terminable annuities, while in the other two there was an express direction that the tenant for life was to take the income of the unconverted assets. In contrast, in *Crawley v. Crawley*, though there was no express trust for conversion, such trust was implied (*sed quære*) by reason of the rule in *Howe v. Lord Dartmouth*, so that "the interest upon the accumulations, though received by the estate as income, had to be invested and accumulated and therefore treated as capital as between the tenant for life and remaindermen, and in *Re Whitehead*, the same result followed because there was an express

trust to convert. Stirling, J., said that the income accrued on the fund must be treated as capital and invested, and that there was nothing in the will which showed that the tenant for life should receive this income as income". The learned Judge concluded that *Re Whitehead* was not opposed to the other authorities but that *Hey's Case* was, because there the will did contain a direction excluding the rule in *Howe v. Lord Dartmouth*, and ought not to be followed. It is, with respect, not easy to appreciate this sequence of reasoning. While it is incontestable that the language of a will may make it obligatory for the executors to treat income *wholly* as a capital asset (cf. *Re Sullivan*), it is more than doubtful that the relevant clause of the will in *Re Whitehead* was sufficiently explicit to attain that effect. In any case, it is one thing to assert that, in the absence of a contrary direction, income of a wasting asset ought to be partially capitalised in accordance with the rule of apportionment, and quite another to suggest that what has been received *prima facie* as income must be treated as if it represented capital. The rule in *Howe v. Lord Dartmouth* does not produce such drastic consequences.

It is instructive to note in this connection the Australian High Court decision in *Michael v. Callil* (*supra*), which has so far provided the sole opportunity of an appellate tribunal pronouncing on this problem. In that case, a testatrix directed her executors to stand possessed of the residue of her estate in trust to convert the same, and invest the proceeds in authorised securities and accumulate the income during the life of W. She further authorised the trustees, notwithstanding the direction for accumulation, to advance at their discretion out of the income of the residuary estate during the said life certain weekly sums for the maintenance and benefit of W.'s wife, a granddaughter and a grandson, and such sums as they in their discretion thought fit for the maintenance and benefit of W., with remainder after W.'s death to persons in succession. The fact that the trust for accumulation infringed Thellusson's Act did not materially affect the question whether moneys receivable by the estate under the will of the testatrix's husband during the life of W. were income and properly applied by the trustees without any apportionment. By a majority of five to one, the High Court decided that the income from the estate *pur autre vie* was distributable as income and that the will had by implication excluded the apportionment rule in *Howe v. Lord Dartmouth*. While Rich and Starke, JJ., confined themselves to a brief statement of their conclusion that the moneys were payable as income, MacTiernan, J., remarked that "the familiar analogy of the tree and the fruits is . . . in point here: the interest acquired by the testatrix is comparable with the tree and the moneys received on account are comparable with the fruits of that tree" (at p. 535). Dixon, J., after a review of some of the relevant precedents, was of the opinion that the present case was similar to and involved the question whether the remainderman was entitled to an adjustment in respect of what the estate received as income from a wasting asset, and Williams, J., thought that "at the date of death the capital value of this asset was the value of the present right to be paid this income. As the right to this income would cease upon (W.'s) death, these payments are terminable payments of the same nature as the rents of a leasehold estate, or the dividends on

shares in a company formed to work a wasting asset such as a mine" (at p. 538). In contrast, Latham, C.J., emphatically endorsed the decision in *Re Hey*:

"There is no capital asset which can be regarded as producing these moneys as income. When the question was put to counsel 'Of what capital assets are these moneys the income?' the only reply was 'Of the right to receive the moneys'. It might as well be said that wages payable under an ordinary contract of employment are income from a capital asset, namely, the right created by the contract to receive the wages. In this case, the whole asset consists of the moneys in question. If a man owns £1,000 Government stock bearing interest, the stock is the capital and the interest is the income. If he has let his land to a tenant, he owns the reversion to which the rent is incident. The reversion is his capital asset and the rents are his income" (at p. 520-1).

What this dissenting judgment, however, does not explain is why rents from a leasehold interest, dividends of terminable long annuities and royalties issuing from copyrights are not, by parity of reasoning, treated as capital receipts; nor is the analogy to contractual payments convincing on the question of the intrinsic nature of income derived from a fund in which the testator had a property right, although of a terminable character. It is submitted, therefore, that the majority conclusion invites support and that, in view of the almost overwhelming authority to the contrary, the decision in *Re Hey* should not be followed. The cases which sustain the proposition advocated in the present article are too numerous and convincing to permit of effective challenge and, it is hoped, will be preferred on a future judicial reconsideration of this issue.

SECTION 35 OF THE SETTLED LAND ACT, 1925

Section 35 of the Settled Land Act, 1925, provides: "Whenever a new trustee for the purposes of this Act is appointed of a trust instrument . . . a deed shall be executed supplemental to the last or only principal vesting instrument containing a declaration that the persons therein named . . . are the trustees of the settlement for those purposes; and a memorandum shall be endorsed on or annexed to the last or only principal vesting instrument in accordance with the Trustee Act, 1925".

The deed of declaration is to be supplemental to, and the memorandum endorsed on, the last or only principal vesting instrument. The section therefore presupposes the existence of a vesting instrument. A new trustee of a pre-1926 settlement may have to be appointed before a vesting deed can be executed pursuant to the Second Schedule to the Settled Land Act, para. 1—*e.g.*, where there are no trustees. In other cases it may be desirable to make such an appointment—*e.g.*, to appoint trustees in the place of the Public Trustee of a settlement subsisting by reason of paragraph 3 of the Schedule (dealing with infants' land). In such cases it is obviously not possible to have a deed of declaration

supplemental to a vesting instrument, and similarly there can be no endorsement of a memorandum. Yet section 35 begins: "*Whenever a new trustee . . . is appointed . . .*". Two questions arise: can an appointment in fact be made before the execution of a vesting instrument, and, if so, how is the operation of section 35 affected?

X Paragraph 1 (2) of the Second Schedule to the Settled Land Act provides that "As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every settlement of land . . . may and on the request of the tenant for life or statutory owner, shall . . . execute a principal vesting deed . . .". Section 13 makes such a vesting deed necessary to enable dealings with a legal estate to be made. When we turn to section 30 of the Act, we find that the trustees, in default of other persons, are "the persons, if any, appointed by deed to be trustees of the settlement" by specified persons. The sequence contemplated is clearly: deed of appointment, vesting deed. Here, therefore, is express authority for the proposition that an appointment of trustees may be made before the execution of a vesting deed. X There is no reason to suppose that this is an express isolated instance. It is rather the recognition of a general principle. Under section 36 of the Trustee Act, 1925, there is power to appoint a new trustee, given certain conditions. There is nothing in section 35 of the Settled Land Act to limit this express power; and it is a rule of construction that an express enactment cannot be ousted by an implied one. Further, where there are no trustees, and none are appointed pursuant to section 30 of the Settled Land Act, the Court can appoint them (Second Schedule, para. 1 (3)). An appointment of a trustee is within section 35, whether made out of or by the Court, and, if a general principle were to be implied from section 35 that a vesting deed ought to precede an appointment, it is strange that this method should be adopted in default of appointment of trustees out of Court, to be followed by a vesting deed out of Court, rather than resorting to a vesting order and following it with an appointment. This is emphasised by the fact that, immediately following the last-mentioned provision, the Second Schedule, in paragraph 1 (4), does deal with vesting orders, but reserves their use to cases of default in the execution of a vesting deed.

X We conclude that there is no objection in principle to preceding a vesting deed by an appointment of trustees. The question then arises: how does section 35 operate in relation to such an appointment? Obviously one cannot make a deed supplemental to a non-existent document, and it is even more impossible to endorse a memorandum on such a document. It is submitted that in such a case one can dispense with both the deed of declaration and the memorandum: the existence of a vesting deed is presupposed by section 35, and in its absence its provisions do not apply. Such a view is in complete harmony with the principles underlying settled land conveyancing. Once a vesting deed is in existence, the "curtain" has descended; a purchaser is not concerned with matters affecting the trust instrument, and documents dealing with them are to be kept off the title. The information contained in the deed of declaration brings the vesting deed up to date, and the memorandum serves to give notice of this deed. Until the execution of the first vesting deed, the "curtain" principle does not come into

operation; section 110 of the Act, as regards the first vesting instrument executed to give effect to a settlement subsisting on the coming into operation of the Act, provides that a purchaser shall be concerned to see (*inter alia*) that the persons thereby stated to be the trustees of the settlement are the properly constituted trustees of the settlement (section 110 (2), proviso (iii)). A purchaser is therefore concerned with the trust instrument in any case, and the deed of declaration loses its purpose. X This may be put in another way. What is the sanction for the enforcement of section 35? None is expressed. The validity of the appointment is not affected: the new trustees become trustees on the execution of the deed of appointment, irrespective of the deed of declaration or the memorandum. The case cannot be brought within section 42 of the Law of Property Act, 1925, but presumably a purchaser could refuse to accept the title, saying that he was not concerned with matters affecting the trust instrument, and could not be compelled to peer behind the "curtain". But, as we have seen, until the execution of a vesting deed the "curtain" does not descend, and his objections in respect of the non-compliance with section 35 on an appointment before the first vesting deed would be groundless.

Support for the views above put forward is to be found in the *Encyclopædia of Forms and Precedents* (3rd ed.), Vol. 18, p. 194 (p)—as amended by the cumulative supplement; in *Prideaux* (23rd ed.), Vol. 3, pp. 489, 528 and 530, where appointments of trustees are given which are intended to be executed before a vesting deed, and in which the recitals of the intention to execute a deed of declaration and endorse a memorandum, contained in other precedents of appointments of Settled Land Act trustees, are omitted; and in *Key and Elphinstone* (12th ed.), Vol. 1, p. 157 (c), where it is stated that "there appears to be no objection to the appointment of the additional trustee for the purposes of the [Settled Land] Act preceding the assent so as to avoid the necessity of endorsement and supplemental declaration". (See, similarly, 14th ed., Vol. 1, p. 181.)

To sum up, section 35 of the Settled Land Act, 1925, must be interpreted as requiring the existence of a vesting instrument in order to apply. This is the only way of fitting it consistently into the pattern provided by the Trustee Act, 1925, s. 36, and the Settled Land Act, ss. 30 and 110 and the Second Schedule.

K. T. SAMSON.

MISSING TITLE DEEDS (LOST, STOLEN, STRAYED, OR BOMBED)

By E. O. WALFORD, LL.D., Solicitor

The short answer to the question: "What is to be done where title deeds are missing?" is a dusty one, namely: "It all depends". It depends indeed on a number of things. For example, abundant authority is to be found in the old cases for the proposition that where a mortgagee merely alleges that the mortgage deeds have been

lost the mortgagor is entitled to institute a suit in order that the matter may be inquired into, and the facts established with the object of settling, so far as may be, the mortgagor's title. On the other hand, a purchaser may have to be content with a great deal less if his vendor or his vendor's predecessor or mortgagee has lost essential deeds. What more is to be done from a practical viewpoint might be said to depend on the answer to the question "What have you?" If the title is registered at the Land Registry it is not a very complicated matter to obtain a new land certificate. As a purchaser has no more to fear from unregistered dealings after the loss of the land certificate than similar dealings whilst it is in proper custody the situation is not very serious.

If, however, essential title deeds have been lost and the title is not registered at the Land Registry, those in favour of land registration may wish to take the opportunity of pointing out that it is a good plan to effect registration at that stage. The putting of a lock on a stable door may not enable the owner to recover the horse that has bolted; but it may prevent the loss of further horses.

It may be assumed, however, that there will be many cases where registration will not be accepted as an appropriate step. The writer recalls a case in which registration of title was suggested to a solicitor in a remote part of Wales as a suitable step. His very indignant answer was that there was "no question" of registration, and that "registration of title is unknown in these parts". No doubt the unknown is always terrifying; but it is equally true that it is unfair to condemn a pudding without tasting it.

Putting aside registration of title and dealing with the nine hundred and ninety-nine cases where the title is unregistered and it is not proposed to register it, a wide field is opened up. Let us first deal with the case of the loss of title deeds by a mortgagor. Judging from the wealth of decided cases in which mortgagees have lost the title deeds one might suppose that they were either particularly unfortunate, or not particular enough in their care of documents.

THE DEFECTIVE LENDER

Even if a mortgagee is ill he is not allowed to treat that as an excuse for burning the mortgage deeds as the mortgagee was found to have done in *Hornby v. Matcham* (1848), 16 Sim. 325; but it may seem curious that a mortgagor whose agent has lost the deeds is very much in the same boat. This view would appear to be supported by a comparison of the case of *Hornby v. Matcham* with another case mentioned below.

In *Hornby v. Matcham* the material parts of the order of the Court in the proceedings which ensued were:—

- (1) That the Master should ascertain what compensation ought to be allowed as compensation for the damage done to the mortgagor's estate by the destruction of the deeds. (As to the meaning of this part of the order see the remarks below.)
- (2) That the amount so ascertained be set off against the mortgage moneys on repayment of the mortgage.

- (3) That on such repayment the then mortgagees should reconvey the mortgaged premises and deliver up all title deeds and writings in their custody or power, and also all office copies of letters of administration of the deceased mortgagee, and attested copies of the deeds destroyed.

In *Brown v. Sewell* (1853), 2 Hare 49, an innocent mortgagee who had merely entrusted the deeds to someone else from whose custody they disappeared fared no better, and a similar order was made. It is, however, gleaned from the judgment that Page Wood, V.-C., did not interpret the order in *Hornby v. Matcham* concerning compensation as referring to "damages which the title might suffer from the absence of the deeds upon a dealing with the property, hereafter, as affecting the market value of the estate". He considered that the damages to be considered were those arising out of the fact that in all future dealings with the estate the decree and other proceedings would necessarily form part of the title; and the procuring of office copies of the proceedings would be attended with expense. As the sum of £500 had been offered by the defendants and approved by Shadwell, V.-C., as damages in respect of the loss of the title deeds (in connection with a mortgage for about £9,000) in *Hornby's Case*, it may be doubted whether the parties had understood the decree of Shadwell, V.-C., as being so limited.

It is by no means clear that the absence of personal default on the part of the mortgagee will absolve him from the liability to give an indemnity to the mortgagor if he cannot produce the deeds when the mortgagor wishes to redeem the mortgage. In the case of *James v. Rumsey* (1879), 11 Ch. D. 398, A had mortgaged leasehold premises to B and C and their solicitor had fraudulently deposited the lease with a third party to secure a sum of £250. Hall, V.-C., remarked that :

"There may be some peculiarity in the settled practice of the Court in respect to the loss of title deeds as between mortgagor and mortgagee, making the case not exactly that of an ordinary liability of a bailee; but it seems to me, looking at the authorities, that a mortgagor, is under such circumstances as exist in the present case, entitled to an indemnity. . . . He was also, I think, right upon the decision in *Lord Middleton v. Eliot* [15 Sim. 531] in coming to the Court to have the matter sifted and inquired into, for the purpose of establishing his title, and having made it clear, so that he might be able to deal with the property in future."

It may be useful to note that the form of the recitals in the Bond of Indemnity and the operative part of the bond prescribed are specified in the report (the operative part being set out in full), and that in accordance with the usual practice, the bond was conditioned for payment of twice the amount of the principal sum secured by the mortgage. Having regard to the particular form of the pleading in respect of loss sustained by the mortgagee Hall, V.-C., made no order for payment of compensation by the mortgagee; but it would seem clear that in a proper case the mortgagee might, though entirely innocent, be ordered to compensate the mortgagor against any loss directly resulting from the loss of the deeds. The form of the bond, as settled by the Judge in the instant case, reflects that liability. It will be remarked that the fact that the mortgagees had allowed the

mortgage deeds to remain in their solicitor's possession had been the cause of their loss. It is surprising that trustees or mortgagees should so often allow deeds for which they are personally responsible to remain in the hands of their solicitors for lengthy periods notwithstanding the fact that no dealings involving the production of the deeds are taking place. The reason is, of course, that the percentage of dishonest solicitors is so minute as to be capable of expression only in decimal form. However, in the present state of the authorities it would not be safe to assume that a mortgagee who keeps the deeds in his own possession but who loses them owing to burglary or theft will escape the cost of proceedings brought against him solely with the object of establishing the facts and settling the title of the mortgagor, though it seems possible that he would not be ordered to give an indemnity. It does not seem possible to state the position with any certainty particularly if the liability of a mortgagor is, as suggested in *James v. Rumsey, supra*, "more onerous than that of a bailee". It is now proposed to consider the authorities bearing on that point.

LOSS BY MORTGAGEE HIMSELF

If the title deeds of a mortgagor are stolen from a mortgagee (*i.e.*, whilst in his own possession) there is some slight authority for contending that no claim of any kind would lie against the mortgagee. In *Jones v. Lewis* (1750-1), 2 Ves. Sen. 240, Hardwicke, L.C., said:—

"It is certain that if bailee of *goods* against whom there is an action of account at law, loses the goods by robbery that is a discharge in an action of account at law."

In that case an administratrix had entrusted the intestate's *goods* to her solicitor so that he might hand them over to the plaintiff when proper to do so. Owing to a robbery whilst the goods were with the solicitor the goods were no longer available. The plaintiff claimed an account of the assets and payment of the balance. The Lord Chancellor held that the administratrix would not have been liable in respect of the loss if the goods had been stolen from her, that she was entitled to entrust them to her solicitor, and that having done so she was under no liability in respect of the loss by robbery from the solicitor.

In *Brown v. Sewell*, 11 Hare 49, *Jones v. Lewis, supra*, was said by Page Wood, V.-C., to apply to the case of the loss of deeds by stealing, upon the principle that "a bailee is not liable for the consequences of such accident where all reasonable care has been taken". Later he referred to the necessity for showing that the loss arose "from some inevitable accident, from which in the ordinary course of events, he could not guard against". The facts in *Brown v. Sewell, supra*, were that the deeds had been lost, but all that could be ascertained concerning their loss was that the loss had occurred either whilst the deeds were held by the mortgagee, or later, by her agent, so that proof of loss by inevitable accident was lacking. However, in *Shelmardine v. Harrop* (1821), 6 Madd. 39, it was proved that the documents had been stolen. Nevertheless an indemnity bond was obtained from the mortgagee under the order of the Court. By that bond the mortgagee, on the payment to him of the mortgage moneys, was required to indemnify the mortgagor against all losses, damages, costs, charges

and expenses whatsoever to which the mortgagor, his executors, administrators or assigns might be put in respect of any demand established by any person in respect of the principal moneys or interest due under the mortgage (following the form of order made by agreement in the earlier case of *Stokoe v. Robson*, 19 Ves. 385). As in *Stokoe's Case* there was no clear evidence of theft or other inevitable accident there is nothing surprising in the form of bond given by the mortgagee; but in *Shelmardine's Case*, *supra*, one might have supposed, if the dictum of Page Wood, V.-C., in *Brown v. Sewell*, *supra*, was correct, that the mortgagee would not have been required to give an indemnity bond. However, it is submitted that the result of the authorities is to show that a mortgagee who has lost the mortgage deeds owing to theft or other inevitable accident *and furnishes satisfactory evidence of that fact*, and offers to give an indemnity bond in the usual form may escape liability in respect of the costs of a suit directed to the re-establishment of the mortgagor's title: see *Smith v. Bicknell* (1805), 3 V. & B. 51, note; *Woodman v. Higgins*, 14 Jur. 846; *Job v. Job*, 6 Ch. D. 563.

It might well be thought that the decisions here dealt with were referable to an implied obligation on the part of the mortgagee to take reasonable care of the mortgage deeds, or to an implied fiduciary relationship towards the mortgagor in respect of the custody of those deeds. There is, however, modern Irish authority for the view that there is no such implied covenant by a mortgagee: *Gilligan & Nugent v. National Bank*, [1901] 2 Ir. R. 513. It may be convenient to note here the fact that by virtue of section 96 of the L. P. A., 1925 (replacing s. 16 of the Conveyancing Act, 1881), where the mortgage was made after December 31, 1881, a mortgagor whose right to redeem is still subsisting is entitled on payment of the costs of the mortgagee to inspect and make copies or abstracts of the documents of title which are in the custody or power of the mortgagee, and which relate to the mortgaged property. That section does not, however, contain any provision requiring the mortgagee to take care of the documents.

GUARANTORS

It would seem on the authority of *East India Co. v. Boddam* (1804), 9 Ves. at p. 469, that if sureties are called upon to pay the moneys owing under a bond and the bond has been lost the sureties on paying the amount of the bond are entitled to an indemnity not only against the demands of the creditor, and those claiming under him, but also against expenses to which they might be put by the loss of the bond. For example, the principal on being sued might object to paying the sureties without bringing the matter before the Court in order to test the question whether the bond was in fact lost. The principle underlying the decision in this case would appear to be applicable also to the payment of mortgage moneys by sureties where the mortgage deeds are missing.

I turn now to the position of vendor and purchaser in cases where title deeds have been lost.

ACKNOWLEDGMENTS AND UNDERTAKINGS

The matter of lost deeds may sometimes be linked up with the right of a purchaser to require that an acknowledgment and/or undertaking in connection with the deeds be obtained by the vendor. In the case of a formal contract the statutory position may be varied by contract. However, if there is an open contract section 45 of the L. P. A., 1925, will apply. The short effect of that section is to throw on the purchaser the expense of obtaining such acknowledgments, or covenants for production, and undertakings for safe custody as the purchaser can and does require with certain exceptions (see sub-section (8)). The relevance of this provision will be seen later; but it is necessary to deal first with a certain subsection of the same section which modifies the obligation of the vendor to furnish an acknowledgment or legal covenant to produce and furnish copies of a document by providing that the inability of a vendor to furnish such acknowledgment or legal covenant to produce and furnish copies of documents "shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents" (section 45 (7)).

EQUITABLE RIGHT TO PRODUCTION OF DEEDS

Where the title deeds relating to the common title of A and B are in the possession of A it appears to be the better opinion that B is entitled, in relation to matters involving proof of his title, to require A to produce those deeds. In *Barclay v. Raine* (1823), 1 Sim. & St. 449, Leach, V.-C., appears to have doubted whether such a right existed; but a few years later he appears to have considered that it did: see *Fair v. Ayres* (1826), 4 L. J. (o.s.) Ch. 166 (otherwise *Fain v. Ayers*). In that case according to the Law Journal report the purchase had been completed and the vendor had refused to produce the deeds or to give a covenant whereby he or any person claiming under or in trust for him, might be compelled to produce the title deeds. The conveyance to the purchaser contained a covenant for further assurance, and the purchaser claimed "further assurance by means of a deed of covenant (as above), or production of the deeds. Leach, V.-C., expressed doubt whether the covenant for further assurance would compel the vendor to furnish a covenant for production not contained in the conveyance. The claim to production was dealt with by the learned Vice-Chancellor as follows:—

"If a party taking a conveyance of lands parcels of a larger estate, without a covenant for production of the title deeds, sells the property, the original title deeds of the estate of which the lands bought by him were parcel, being the root of his title, there is a common property in those title deeds in him and those under whom he claims; and a Court of Equity will compel the production of those deeds; for otherwise no one would buy from him. . . . I am of opinion that there is an equity on the part of the plaintiff to have the production of those deeds in order to give effect to his sale."

The report in the Law Journal of *Fair v. Ayres* contains a footnote which seems to suggest that when expressing the retention of his doubt as to the extent of a covenant for further assurance Leach, V.-C., was

referring to *Hallett v. Middleton*, 1 Russell 243; but as that decision was one of Lord Eldon, and judgment was delivered by him some months after the judgment in *Fair v. Ayres*, it appears to be probable that the reporter's intention must have been to draw attention to the fact that in *Hallett's Case* Lord Eldon appeared to be satisfied that a covenant for further assurance entitled the covenantee only to call for a further conveyance and not for a "covenant or collateral obligation". In the report of *Fair v. Ayres*, *sub nom. Fain v. Ayers*, in 2 Sim. & St. 533, Leach, V.-C., is reported as saying, following the passage as to common title deeds being common property, "I strongly incline to think that the plaintiff has an equity to that extent, and *I am informed that the Lord Chancellor [Lord Eldon] has expressed an opinion to that effect*".

The case of *Barclay v. Raine*, 1 Sim. & St. 449, if still good law, might be cited as a warning to vendors not to enter into an open contract if they have not in their possession either all the title deeds or an effective acknowledgment of their right to production of them. The essential facts in that case were as follows. Certain premises were held under a common title. Part was sold to J. Thring and part to G. Barclay. J. Thring received the deeds and gave to the then vendors a covenant to produce them to the vendors, their heirs, executors, administrators and assigns. No deed of covenant was given to G. Barclay. The premises purchased by J. Thring eventually passed to James and John Slade, but it appears that J. Thring allowed part of the purchase money to remain on mortgage to him, so that he retained the deeds. The remainder of the property taken by G. Barclay as above, passed into the hands of his sons who sold to Raine. In these circumstances the sons were unable to deliver the title deeds to Raine or to compel the giving of a covenant for their production. They applied to James and John Slade for a deed of covenant to produce the deeds; but the Slades refused to give one. On application to J. Thring as mortgagee, the sons were a little more fortunate. First, J. Thring executed a deed of covenant with Raine to produce the deeds whilst he was mortgagee. Raine, however, was not so easily satisfied. Thring then executed another deed of covenant acknowledging the execution of the original deed of covenant (since lost, but of which a rather mutilated copy was available), and also that the deeds mentioned in the Schedule to the original deed of covenant were, at the date of the last-mentioned deed, in his possession. Still, Raine was not content, and when the vendors filed a bill for specific performance the matter came before the Master who expressed the opinion that the vendors should produce a deed of covenant for the production of the deeds from James and John Slade, and submitted for consideration by the Court the question whether without such a deed of covenant the purchaser, Raine, could be called upon to complete his purchase. Counsel for the vendors contended that the existing covenants by the mortgagee, the party holding the deeds, was sufficient and that the purchaser would have a right in equity to the production of the deeds. Leach, V.-C., dismissed the Bill, delivering judgment shortly as follows:—

"A Court of Equity never compels a purchaser to take without title deeds, unless he has a covenant to produce them; and a right

in equity to compel the production of the deeds, even if it existed, would be no answer. But the equity of the purchaser, in the present case, would be highly questionable. Thring's [*i.e.*, the mortgagee's] covenant to produce does not run with the land; nor is it pretended that Slade [the owner of the equity of redemption] had notice of that covenant; and Slade, like every other proprietor, has a material interest against the exposure of his title deeds".

The points of particular interest in that judgment were:—

- (1) The unqualified statement to the effect that that specific performance will not be decreed unless the title deeds are to be handed over, or an effective covenant to produce them exists or is obtained.
- (2) That there is no suggestion that a purchaser has an unqualified right in equity to obtain the production of common title deeds, *i.e.*, by any person who happens to have possession of them. That person may object on the ground that the production of the title deeds may expose him to attack on the ground that his deeds do not disclose a good title. Counsel for the vendor in the instant case, contended for the rule that where two parties claim under the same title deeds the party holding them can be compelled to produce them to defend the title of the other party, citing *Banbury v. Briscoe* (1680) 2 Cas. in Ch. 42. But he admitted that this right could only be exercised where the party requiring production shows a clear title, not adverse to that of the party holding the deeds.

The proposition that a subsequent purchaser of part of the land comprised in a conveyance may compel production of that conveyance in proof of his title seems now to be treated as established, and in giving his decision in the case next mentioned it would seem that the learned Judge thought that it was unnecessary to refer to any authorities to support that view.

The case in question was *Re Jenkins and Commercial Electric Theatre*, [1917] W. N. 49. Under an Order of Court, Nos. 11 and 13 High Street, Aberavon, were sold and conveyed to one Rees. Nos. 7, 9, 11 and 13 High Street had been held under a common title by the former owner. Later, the deeds came into the hands of his widow as tenant for life and subsequently of her executor, whence they passed to that executor's solicitors, Messrs. Jones & Co. On the sale to Rees of Nos. 11 and 13, Rees was given by Messrs. Jones & Co. an acknowledgment that they held the deeds of the four properties 7 to 13 High Street on behalf of Rees as owner in fee of 11 and 13 as well as on behalf of the owners in fee of Nos. 7 and 9, with an acknowledgment of the right of Rees to production and delivery of copies of the documents in question. They further undertook not to part with the deeds to any other person without the consent of Rees. Later, Nos. 7 and 9 were sold under an open contract, and the solicitors acting for the purchasers required that the title deeds be handed over. The vendors offered the purchasers an acknowledgment by Jones & Co. in respect of Nos. 7 and 9 similar to that given to Rees on the purchase of Nos. 11 and 13. This offer being refused, the vendors took out a summons under the Vendor and Purchaser Act, 1874, claiming a declaration that the requisition requiring the deeds to be delivered to

the purchaser could not be insisted upon. On behalf of the purchaser counsel contended that the acknowledgment would not run with the land and that under an open contract the purchaser was entitled to an acknowledgment and undertaking from someone having a legal interest in the deeds (which the solicitors had not), citing *Williams on Vendor and Purchaser*, 2nd ed., pp. 684, 689. Those contentions accorded closely with the terms of the judgment in *Barclay v. Raine*, *supra*; but according to the report, Neville, J., referred to no authorities when delivering judgment, but merely said, "I think that the equitable right to production that the company [the purchasers] have is adequate under the circumstances". Whether that decision of Mr. Justice Neville was considered by the learned editors of *Williams on Vendor and Purchaser* cannot be determined, as no reference to it is to be found in the latest edition (1936). There the case of *Barclay v. Raine*, *supra*, is still cited as authority for the following proposition concerning the equitable right to production of title deeds: "But the fact that the purchaser will on completion have this equitable right to production of the title deeds does not prevent him from claiming an acknowledgment for their production; he is entitled to have secured to him either the legal right to enforce a covenant for production or the benefit of an acknowledgment" (4th ed., p. 701). It is submitted on the same page that an equitable right to production of deeds may be lost like any other equitable right if the deeds come to the hands of a purchaser for value without notice. However this may be, section 45 (7) expressly prevents a purchaser under an open contract from objecting to the absence of an acknowledgment or undertaking in respect of title deeds where the vendor is *unable* to furnish it, if the purchaser, on completion, will have an equitable right to their production. That provision merely repeated rule 3 of section 2 of the Vendor and Purchaser Act, 1874, and the view expressed in the 4th ed. of *Williams on Vendor and Purchaser* (as above) concerning its effect, was evidently shared by other conveyancers: see, for example, the 9th ed. of *Wolstenholme's Conveyancing and Settled Land Act Statutes* (edited by Benjamin L. Cherry and A. E. Russell) p. 10, where it is stated that the rule applies only if the vendor's endeavours to obtain an acknowledgment are unsuccessful. Possibly it should be assumed that Neville, J., in *Jenkins' Case*, *supra*, had considered this point and had concluded that the vendor could be said to be "unable" to furnish the purchaser with the acknowledgment.

The point here raised may be connected with the loss of title deeds in cases where the documents handed to the vendor upon completing his purchase have been lost and the evidence does not show clearly whether an acknowledgment was given in respect of earlier title deeds held by a former owner. It is submitted that in such a case the vendor would be under the obligation of using his best endeavours to obtain an acknowledgment from the holder of the title deeds.

PROOF OF MISSING DEEDS

If all possible efforts to discover a deed have been exhausted, secondary evidence is admissible to prove it. Broadly speaking, any evidence is admissible, but although it is said that there are no degrees

of secondary evidence, it is obvious that a completed draft or an examined abstract would form much more convincing evidence than the recollection of say someone who had read, or even executed the document, apart from any suggestion as to fraud. Thus if the document was executed in duplicate the counterpart would be admissible, or failing a counterpart a copy might be forthcoming. In the absence of either parol evidence would be admissible (*Villiers v. Villiers*, 2 Atk. 71). However, where a lost deed is set up it is in general necessary to prove that the document was executed by all necessary parties (*Bryant v. Busk* (1827), 4 Russ. 1); but in the case of documents which are dated many years ago due execution may be presumed (*Moulton v. Edmonds*, 1 De G. F. & J. 246). As to stamping the rule is different, it being presumed that documents have been duly stamped in the absence of evidence to the contrary (*Hart v. Hart*, 1 Hare 1; *Closmadeuc v. Carrell*, 2 Jur (N.S.) 474; *Marine Investment Co. v. Heaviside* (1872), L. R. 5 H. L. 624). On the other hand, if it is shown that a document ought to have been, but was *not* duly stamped, parol evidence of it will not be admitted (*Smith v. Henley*, 1 Ph. 391).

Old authority for the rule that secondary evidence of the contents of lost or destroyed documents may be adduced is to be found in *Kensington v. Inglis* (1807), 8 East 273; *Doe v. Wittcomb* (1853), 4 H. L. C. at p. 431; and *Brewster v. Sewell* (1820), 3 B. & Ald. 296. A modern decision to that effect may be found in *Re Halifax Commercial Banking Co. & Wood* (1898), 79 L. T. 536; 15 T. L. R. 106. That case furnishes authority for the proposition that the loss of title deeds does not absolve a purchaser from the obligation to complete the purchase, if furnished with satisfactory secondary evidence of the lost documents, and of their due execution. It is not, however, permissible for a vendor to escape from his liability to deliver the title deeds by treating as "lost" documents which exist and ought to be in his possession: *Re Duthy and Jesson*, [1898] 1 Ch. 419. In that case the purchaser had agreed to accept the best title the vendor could give. In 1848 the owner had mortgaged the property to trustees, some of whom died, and there had been transfers to new trustees. The mortgage was paid off later, but no reconveyance was executed. The mortgage and other deeds remained in the hands of the mortgagees' solicitors. An abstract commencing in 1894 was supplied to the purchaser, but he required that the earlier deeds should be handed over. When the matter came before Romer, J., he suggested that the representatives of the mortgagees be traced and an endeavour made to obtain authority from them to hand over the deeds. Apparently that suggestion was not followed, and when Romer, J., delivered judgment he held that the purchaser was entitled to have the earlier deeds handed over. He observed that if real difficulty arose which prevented the vendors from handing over the deeds he might have considered whether the vendors were bound to overcome it. As to the last-mentioned point see *Halkett v. Earl of Dudley*, [1907] 1 Ch. 590 (documents in a foreign country).

It is well to bear in mind the fact that section 45 of the L. P. A., 1925, deals only with what is to be done before completion in support of the title deduced by the vendor. In *Re Stuart and Olivant's Contract*, [1896] 2 Ch. 328, Kay, L.J., said that a vendor might

not have any of the title deeds in his possession, but that he need not disclose that fact; he need not make any condition in the agreement throwing the expense of ascertaining where they are upon the purchaser; but when the purchaser asks him where they are, he may safely answer, "I do not know, and if you want to know I will find out at your expense". The decision in *Re Duthy and Jesson, supra*, shows that although those observations are perfectly correct, they do not mean that specific performance will be enforced if essential title deeds are traceable and the vendor does not take the necessary steps to procure their production.

ABSTRACT OF MISSING DEEDS

Nor does it mean that where the vendor or someone claiming under him, such as a mortgagee, has lost the title deeds, the purchaser must complete the purchase without being furnished with an abstract. On the contrary the vendor may himself be compelled to go to the expense of ascertaining the custody of the latest abstract of title, or of completed drafts of lost documents or of the original earlier title deeds in order to prepare the abstract of the title, *Re Johnson and Tustin* (1885), 30 Ch. D. 42.

It would seem that a clause in a contract providing that the vendor is not to be required to produce any deed or document not in his possession and abstracted will be read as meaning that the vendor is not to be required to deliver on completion such deeds, thus leaving him to search for and cause to be produced to the purchaser in verification of his title all the documents which can be traced, in so far as the vendor has the power to procure their production: see *Southby v. Hutt* (1837), 2 My. & Cr. 207.

PROCEDURE

Having regard to the statutory provisions and decisions above mentioned, and to the practice of inserting in formal contracts a right if a purchaser insists on a requisition for the vendor to rescind the contract on the ground of (*inter alia*) expense in complying with it, a purchaser will but rarely be able to compel his vendor to furnish him with an Indemnity Bond in respect of any loss arising out of the absence of title deeds, unless the point arises in connection with the agreement of the terms of the contract and is successfully pressed by the purchaser's solicitor. If, however, the contract contains no undertaking by the vendor, then even if the vendor admits that the deeds have been lost it is by no means clear that the purchaser will be able to insist upon specific performance upon the terms that an Indemnity Bond be given by the vendor. It may be that if the vendor sought to exercise his right of rescission (pursuant to the usual rescission in formal contracts) on the ground of the expense involved in relation to the preparation, agreement and execution of the bond itself he would be considered to be acting arbitrarily (as in the case where a vendor refused to go to the expense involved in an appointment of new trustees) and would not be allowed to exercise the right of rescission on that ground. On the other hand, the consequences of entering into such a bond might prove to be very serious because the purchaser might be able to establish that considerable expense or loss

had been incurred owing to the absence of the title deeds, and other serious eventualities (such as the existence of a legal mortgage) may be imagined. Hence, it is possible that a vendor could escape from the contract if a requisition were pressed that such a bond be given. In any event, it seems fairly clear that the vendor could not insist upon the purchaser completing his purchase without some satisfactory explanation in a case where essential title deeds were lost, because it is a vendor's duty to deliver all deeds which ought to be in his custody and which relate to the property sold.

In practice it is not unusual for the problem to be solved by the taking out of a policy on the lines of an Indemnity Bond for an agreed maximum amount. Suppose, however, that the question of an Indemnity Bond or of a policy does not arise. What is to be done where, subject to reasonable evidence of the loss, the purchaser is willing to proceed?

STATUTORY DECLARATION

Normally the evidence of the loss consists of a statutory declaration by the person last known to have had the documents in his custody. The declaration should identify the documents and proceed with statements as to the following matters:—

- (1) The name and address of the person who handed the documents to the declarant.
- (2) What was then done with the documents, and by whom.
- (3) Whether the documents or any of them were at any time removed from the place in which the declarant first placed them. If so, whether the documents were examined upon such removal and whether any, and if so, which of them were missing.
- (4) The purpose for which any document was removed, and to whom they were handed or produced, and whether they were examined on their return.
- (5) When the documents were last seen and whether they were then examined and found to be complete. If not so examined, whether there is good ground for believing them to be complete (*e.g.*, that the documents were placed in an envelope in a certain place to which access could only be had by means of a key, and that the declarant was the only person who had a key—or that the envelope had been sealed and that there were no signs of tampering with the seal).
- (6) When it was first learnt by the declarant that the documents were missing, and the steps which were then taken to trace them, giving particulars of the places in which search has been made and the persons to whom inquiries have been addressed.
- (7) That the documents were not removed by, or by the order of, the declarant from the place mentioned in (5) above and in particular that they have not been deposited by him for safe custody or by way of security.
- (8) (If appropriate.) That he knows of no reason why the documents should not now be in the place mentioned in (5) above (or that he considers that it is possible, or probable, that they

were destroyed in error, or by enemy action, indicating the occasion).

The exact wording must of course depend upon the circumstances. In addition, where the declaration is made by a third party and is somewhat vague, and there remains the possibility that the party entitled to the property to which title is shown by the deeds may have been the last person to hold them, a declaration by that party may be desirable.

OTHER EVIDENCE

It would not, of course, be very satisfactory to rely on such a declaration alone; and there must be very few cases in which it is impossible to obtain some sort of secondary evidence concerning the deeds, or some of them, such as abstracts of the missing documents.

There is, however, the possibility that the owner's documents and the examined abstract have been lost together. Even in those cases inquiries may show that the purchaser did not receive any documents except the conveyance to him, and that the prior documents are in the hands of other solicitors, so that an abstract of the title prior to the conveyance to the purchaser can be prepared and marked as examined against the originals. In short, in most cases it will be possible, with diligence, to produce reasonable evidence that the present owner has in fact a good title to the property notwithstanding the loss of the deeds.

There remains the case in which the whole of the documents which are required to prove the title have been lost by the present owner or his mortgagee or other the person who last held the documents, and no completed copy drafts, examined abstracts or other written evidence can be traced in verification of the title. Even in such difficult circumstances the situation is not hopeless. The solicitor who acted for the present owner may be able to make a declaration that he acted for the present owner when he purchased the property, that a good and marketable title was deduced by the then owner, that he examined the documents of title and marked the abstract accordingly; that he completed the purchase on or about a certain date and took over the title deeds (or certain title deeds) and the conveyance to the purchaser duly executed by the vendor and witnessed, and passed the deeds to the purchaser after the conveyance (or assignment) had been duly stamped, or, as the case may be. His records may enable him to state the amount recorded in his books as paid for stamp duty and possibly for the production of deeds or for costs. It would, however, be tedious to prolong this outline of possible methods of producing secondary evidence of lost documents.

STATUTES OF LIMITATION

Suppose, however, that there is really no useful evidence obtainable concerning the documentary title. It may still be possible to force a thirty years' title on the purchaser if it is duly evidenced by a statutory declaration, showing the exact circumstances in which possession was taken, subject to a possible extension of time for disability under the Limitation Act, 1939, or under the Limitation (Enemies, etc.) Act, 1945. The position is concisely stated in *Williams on Vendor and*

Purchaser (4th ed.), pp. 122, 123. The vendor must show not merely possession for thirty years, but also "who were [previously] rightfully entitled and that the vendor's possession has effectually barred their claims", citing *Jacobs v. Revell*, [1900] 2 Ch. 858, and *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, 401; affirmed [1906] 1 Ch. 386; *Re Atkinson and Horsell's Contract*, [1912] 1 Ch. 2, 8; 2 Ch. 1, 11, 19. If, however, the vendor's title is documentary, but he has not the deeds, he must account for their absence, and adduce such evidence as he can of their contents, and of their execution: *Re Halifax Commercial Banking Co. and Wood* (1898), 79 L. T. 536; 15 T. L. R. 106.

BOMBING

As a number of deeds of all kinds have been destroyed by bombing it is desirable to add that such cases appear to be covered by the general law as above set out. In broad terms it may be said that what has been stated above concerning mortgage deeds stolen or lost by inevitable accident would apply with equal force to mortgage deeds destroyed by enemy action. It appears to be the better opinion that the Liability for War Damage (Miscellaneous Provisions) Act, 1939, which relieves bailees of goods (subject to certain exceptions) from liability for loss or damage caused by war operations to goods does not apply to title deeds. The Act contains no definition of goods, and although the Sale of Goods Act, 1893, does contain such a definition—and a very wide one—a distinction is made between goods and documents of title, though it is not a very clear one. Little assistance is to be obtained from the War Damage Acts of 1941 or 1943 where it is declared that goods do not include "evidences of title to any property or right". The fact that the Legislature has thought fit in one Act to relieve the public and its advisers of doubt concerning the meaning of one particular word by declaring what it does not include for the purposes of that Act is no indication as to what that word does or does not include for the purposes of another Act. With that depressing observation I must close this lengthy, but perhaps not very informative, article.

THE PENAL CONSEQUENCES OF THE EQUITABLE DOCTRINE OF CONVERSION

By A. K. R. KIRALFY, LL.M., Barrister-at-Law

(I) *The Changing Nature of Equity*. Equity has traditionally been regarded as tempering the rigours of common law and relieving against the consequences of unforeseen accidents. A good example is the equitable attitude towards the doctrine of merger. This attitude, now made statutory in the Law of Property Act, 1925, s. 185, was designed to prevent undesired consequences flowing from the union of two estates in property. By keeping alive both interests the strict rules of common law were circumvented. Another doctrine, that of relief

against penalties and forfeitures in equity is typified in the law of mortgages where the borrower's interest is kept alive in equity after it has disappeared under the strict rules of common law, and in the rules that conditions may be substantially performed even if not literally performed, provided no third party is prejudiced.

Such is the revolution in modern equity that the more technical and geometrical aspects of the subject have come more and more to override these older and kinder doctrines. We are faced with the paradox of rules of equity being applied so as to attract penal consequences which could not have been incurred by applying rules of common law. This was perhaps inevitable with the advances made by the proprietary aspects of equity at the expense of the ethical and conscientious aspects. Equity is today part of the law of property. Not only has it borrowed the rigid and metaphysical conceptions of the law of property; what is more it has tended increasingly to convert into forms of property rights which in essence are purely personal. The logical result has been to produce an artificiality greater even than that of the medieval common law. The penal consequences which will be the subject of this paper are produced by the combined action of three maxims, "equity looks to the intent and not the form", "equity looks on that as done which ought to be done" and "equity follows the law". In effect, if there is a penal rule of common law, in the sense of a rule destroying a property right without substantial justification, equity will extend the application of that rule to cases where, owing to informality, or to a position in time, the common law rule could not have been applied by a common law court. The notion that something which ought to be done is treated as already done, a gross departure from fact, is the main offender. Adopted in the belief that it would be beneficent in operation it has in many cases produced the opposite result. Had it been confined to judging the wrongdoer it would have been laudable. But it has been unwarrantably extended to judge between innocent parties claiming rights of property in competition with each other.

(II) *The Rule of "Terminus Certus"*. A lease at common law was void if made for an uncertain term. The "term of years" by its very name demands a definite duration. In practice an express demise for an indefinite period would be unusual, but in special circumstances such a demise might seem reasonable. Such a case occurred in *Lace v. Chandler*, [1944] K. B. 368. It may not be obvious how this case illustrates our point, but the reasoning of the decision is clear. The Court of Appeal held that a lease "for the duration of the war" was void because of uncertain duration. Consequently a lease of this kind is not a lease which may take effect without a deed at law, by virtue of the Law of Property Act, 1925, s. 54, not being for three years or less. It can only fall within the general rule enacted in s. 52 of the Act, that such a lease requires a deed under seal. But in the actual circumstances there was no deed of lease, only a written entry in a rentbook. Lord Greene (then Master of the Rolls) repeatedly refers to this rentbook as having created a "tenancy" and at one point (p. 370) specifically refers to it as a "tenancy agreement". The common law rules as to certainty of term were thus applied to an equitable term of years because equity would regard the parties as

bound to effectuate a formal demise under seal, or because equity would follow the law on the point of certainty. The result was to avoid an arrangement reasonable in itself and involving no real danger of offending public policy. In fact Parliament simply legislated to reverse the decision of the Court of Appeal but not the broad principle of the decision (Validation of War-time Leases Act, 1944). The question remains, was it necessary to call the Legislature into action? Need the medieval rule as to certainty of term have been applied at all?

(III) Where a lessee purports to underlet property for the whole balance of his term a technical rule of common law operates so as to destroy the head-lease by a "constructive surrender" (*Preece v. Corrie* (1828), 5 Bing. 24). The lessee intends to remain mesne tenant and the sub-lessee realises this. It may be that the sub-lease includes other premises over which the lessee has longer terms. No one intends the head-lease to be surrendered or the sub-lessee to become directly responsible to the head-landlord. Yet the common law brings this about because technically the head-lessee must retain a "reversion", though one day would be a sufficient reversion to prevent this rule applying. In *Milmo v. Carreras*, [1946] 1 K. B. 306, a lease was to expire on November 28, 1944. By written agreement the lessee made a sub-lease for one year beginning November 1, 1943, and so expressed as not to be terminable before November 28, 1944. The lessee thus retained no reversion and was held to have surrendered his head-lease. In this case the sub-lease was valid at law as a sub-lease but it was argued that, not being under seal, it could not technically work a surrender. The Court of Appeal held that the head-lease had terminated by operation of law (under the Law of Property Act, 1925, s. 52 (2) (g)) Lord Greene, M.R., emphasised that the underlessee had a right to the head-term in equity and that the head-lessee became a trustee of the head-term. Here again a penal rule of law was extended to a new field of operations by an equitable fiction.

(IV) It often occurs in practice that a "protected life tenant" forfeits his interest by making an assignment or creating a charge in ignorance of the fact that his interest will thereby become forfeited. In some cases the Court may succeed in preventing this unhappy result. In *Re Sheward*, [1893] 3 Ch. 502, Kekewich, J., relied on a possible misunderstanding between client and solicitor. "What I have to consider", said the learned Judge, "is not whether the document meant what its language imports but whether operation can in conscience be given to that meaning. My conclusion is that Mr. Sheward Brown did not intend to charge his life interest and cannot be taken to have consented to sign a document of that purport." But later Judges were not so complaisant. In *Re Baker*, [1904] 1 Ch. 157, a charge granted "unfortunately in forgetfulness of the forfeiture clause by both the debtor and the creditors" was held to forfeit a protected life interest, so that the property passed under a gift over. Since equity regards that as done which ought to be done the same reasoning was applied to an agreement to assign or charge (*Re Lind*, [1915] 2 Ch. 345; *Re Spearman* (1900), 82 L. T. 302). The stage was now set for a complete reversal of the principle of *Re Sheward* (*supra*) and the supersession of "conscience" by geometrical notions of property. In *Re*

Gillott, [1934] Ch. 97, a wife had power to appoint to her husband until he should assign his interest. The husband and wife in fact entered into an agreement to pay future income into a special account, as security for a loan. At law the contract would not have worked a forfeiture. Maugham, J., as he then was, held, consistently, that the income became the property of the lender in equity and was held by the husband as trustee for him. Hence a forfeiture had occurred, although the transaction was devised to avoid that result. The husband and wife were no doubt doing what the donor of the power desired to prevent, but the learned Judge showed some concern, stating: "There is some ground for the view that a document ought not to operate as an equitable assignment unless the parties mean it to be such. It is said that in this case it is clear that the second husband, the wife and their advisers were doing their best to avoid any equitable assignment". The latest case is *Re Haynes*, [1949] Ch. 5. Here a legatee covenanted to transfer to the trustees of his marriage settlement a share in his father's estate, a common use of the "after-acquired property" clause. The father had inserted a forfeiture clause in his will in case the son's share "became vested in or payable to some other person or persons". Roxburgh, J., held that the covenant in the marriage settlement must be treated as an actual assignment although the legatee himself had not intended it so to operate. It may be added that this was hardly the danger which the testator wanted to avoid. The settlement of property is hardly a transfer to "other persons" (see *Re Turner's S. E.* (1884), 28 Ch. D. 205, at p. 213). The share, however, was held to have been forfeited.

(V) One of the most unfortunate instances in this field is the application of "statutory trusts" to adeem or destroy rights of property, sometimes by converting legal into equitable interests, sometimes by converting real into personal property or vice versa. The statutes themselves do not specify this result, on the contrary they seldom seem to have had it in contemplation. The equitable doctrine of conversion must first be applied to the enactment to have this result. This story may be traced from the well-known case of *Re Robson*, [1916] 1 Ch. 116. The Land Transfer Act, 1897, s. 2 (1), vested real estate in the executor in place of the devisee and provided that the executor should hold the land on trust "for the persons by law beneficially entitled thereto". To the uninitiate the obvious object of this provision would seem to be that no change was to be made in the corresponding beneficial interests. Under the pre-1898 law two children would have shared a certain gift, by way of legal remainder, to the exclusion of another two. If the rules of equity were applied, because the legal estate was now vested in the executor as trustee, all four would share. Counsel for the two elder children argued, "The Act was merely intended to simplify the machinery for the administration of real assets, not to affect the ultimate rights of the persons interested, or the construction of the will. In other words the Act altered the rights of administration as between the devisees and the executors, but it did not touch the construction of the will or the rights of the devisees *inter se*". Astbury, J., however, held that the words "by law" in the section included the unintended effects of the section itself. The rules as to equitable remainders had therefore to

be applied, because of the trust imposed by the statute on the executors, in whom the legal estate was now temporarily to be vested. These rules differed substantially from those which would have applied but for the Act. To justify this "geometrical" ruling Astbury, J., relied on two Australian decisions on similar legislation (*Re Beavis* (1906) 7 N. S. W. State Rep. 66; *Re Champion* (1908) S. Aus. L. R. 1). "Foreign" decisions are cited with extreme rarity on points of property law and it is paradoxical that the Australian Courts should have helped establish a highly technical rule so typical of the reasoning of the Old World. The decision in *Re Robson* had some merit on the actual facts, but the principle was not confined to cases where the class of beneficiaries could be increased rather than reduced.

The next leading case was *Re Price*, [1928] Ch. 579. Here an entailed interest had been held in common before 1926. The Law of Property Act, 1925, s. 35, imposed a trust for sale in the case of all existing tenancies in common, whereas section 130 permitted entails in personalty only in cases of future creation. As a result of this "*casus omissus*" the entailed interests were held to have been converted into absolute interests in personal property. Clauson, J., was not entirely happy at this result and tried to find some way in which to authorise entails in personalty created in realty before the statutory trusts were imposed, but was unable to find any warrant for it. "If it be said", he continued (at p. 591) "that the view I have expressed gives too narrow an operation to the Act and that the Act ought not, if such a construction can reasonably be avoided, to be construed to destroy without compensation the rights of those in the line of entail, a destruction which is effected by treating Thomas John Price as acquiring an absolute interest in his share of the proceeds of sale, the true answer would seem to be that no alternative construction is reasonably available". The statute merely imposed an obligation to sell; it did not itself convert the beneficial interests. The real crux remains the equitable doctrine of conversion. In a similar later case, *Re Kempthorne*, [1930] 1 Ch. 268, Maugham, J., had to deal with a devise of freeholds owned in common by a testator who died after 1925, having made his will in 1911. The learned Judge felt bound to follow *Re Price* (*supra*) and held that the statutory trusts had adconverted the devise of the freehold land by converting it notionally into personalty, the proceeds of the trust for sale. Counsel argued in vain "The coming into effect of the Law of Property Act, 1925, did not adversely affect beneficial interests then existent. The words used in section 35 are 'for giving effect to the rights of the persons interested in the land'. The provision must mean that the statutory trusts are not to affect any beneficial right. If that is not its meaning the Law of Property Act is operating in a manner in which an Act of Parliament cannot be conceived to operate". The Court of Appeal upheld Maugham, J., holding (p. 291) "there was no escape from the conclusion" since the Legislature had omitted to provide for notional reconversion of the proceeds of the sale under the statutory trust for sale, so as to prevent the equitable doctrine of conversion applying.

H. B. Vaisey, K.C., had to argue, successfully, for the ademption of the devise of land. But it is interesting to compare his views, when, as Vaisey, J., he had to adjudicate on a similar point in *Re Harvey*,

[1947] Ch. 285, saying (at p. 288): "Apart from authority I think that a very strong case could be made against the suggested ademption. After all, the object of the Act, in this regard, was to provide improved machinery and not to affect, more than necessary, the beneficial interests of landowners. I venture to think that on a matter such as this the testator's language ought to be taken in its popular rather than in any technical sense. True it is that his will was probably prepared by a lawyer but I can hardly attribute to the latter in 1912 any sort of prescience of the legislation of 1925". In fact it was possible to distinguish the older cases in this case because of the lucky accident of a 1927 codicil. A reference to "my share in X farm" could then be construed as confirmed, so as to prevent ademption, on the basis that the testator knew about the statutory trusts when executing the codicil and meant the devisee to take the corresponding interest in personal property.

The general rule has, however, lately again been asserted in the case of *Re Cook*, [1948] Ch. 212. On January 1, 1926, freehold land vested in a husband and wife as joint tenants, so that a trust for sale arose under the Law of Property Act, 1925, s. 36, and the beneficial interests were notionally converted into personality. In January, 1944, the husband died so that the wife became solely entitled by right of survivorship. She died in September, 1944, leaving her "personal estate" to X and Y. Harman, J., held that X and Y did not take the freehold land, as reconversion operated at the moment of the husband's death when the need for the statutory trust for sale terminated. It had been assumed that such termination required some solemn act, in view of the solemn nature of the trust for sale as the creature of statute. But Harman, J., pointed out that a trust cannot exist where the trustee is also the sole beneficiary. Had there been a specific gift of real estate to another party the result would be unexceptionable as the testatrix may reasonably have regarded her property as land. In fact this was not the case. As the learned Judge said (p. 216): "It seems unlikely that the testatrix intended to dispose only of the personal estate in the lawyer's sense of that word and not to deal with the more substantial part of her property, namely this house, in which she lived, and her other freehold house, but this is a case where a layman has chosen to use a term of art".

(VI) The ademption of legacies by the exercise of options is a well-known bone of contention among lawyers. The criticisms raised concern the irrelevance to the optioner of the destiny of the money he pays. It is considered pointless that his exercise of the option should convert the property so as to change the identity of the persons who take the other benefits. If a testator, for example, devises land and then grants an option to purchase, the Courts deprive the devisee of the land if the option is exercised but do not permit him to take the price. The property is treated, instead, as if it had been given to the successor to personal property, say the residuary legatee, and that person receives the price. Once the doctrine of conversion by contract was established in equity it was probably inevitable that it should be applied to options. But the extension has been the target of special criticism by judges and jurists. It has been generally rejected in the United States (Simpson (1935) 44 Yale L. J. 564). Lord Romer has said: "Why

the exercise of the option should have the effect of taking away the real estate from the person to whom it has been devised and giving it to the person who has the personal estate is what I have never been able to understand" (*Re Carrington*, [1932] 1 Ch. 1, at p. 17). The judges have all criticised the rule but professed powerlessness to change it. The rule applied in these cases, generally referred to as the Rule in *Lawes v. Bennett* (1785), 1 Cox 167, was rejected by Dr. Hanbury (*Equity*, 5th ed., p. 380) and by Professor C. K. Allen (48 L. Q. R. 458). Its extension to personal property has been characterised as unsound because conversion presupposes specific performance and no such relief is usual in the case of options to purchase personal property (Simpson, 44 Yale L. J. 560).

It would be more logical, however, to reject the doctrine of conversion by contract altogether. It creates as many evils as it removes, and it postulates an untruth as a reality. Walter Hart attacked this major doctrine itself (24 L. Q. R. 403, at p. 406) as an "ungodly jumble" and after academic criticisms (*e.g.* Stone (1913) 13 Columbia L. R. 369) New York State has provided that a contract to sell land shall not attract the doctrine of conversion so as to affect the beneficial rights of devisees and legatees (Decedent Estate Law, 1916, sec. 37). Yet *Re Carrington* has recently been followed, without criticism, and almost without discussion, in *Re Rose*, [1949] Ch. 79 (see p. 88).

(VII) A contract is not subject to the Rule against Perpetuities and is enforceable as between the original parties at any distance of time. This well-known rule has received confirmation in a number of recent cases, such as *Re Wright and Deane*, [1948] Ch. 686, and *Hutton v. Watling*, [1948] Ch. 398. Where an option is sought to be enforced against a third party, however, it will be void unless two circumstances concur; the option must be limited so as not to be exercisable outside the perpetuity period, and it must be registered as a land charge. This is the result of the Land Charges Act, 1925, s. 10, which requires registration of such options in order to bind purchasers of the land subject thereto, and speaks of "valid" options to purchase. If the option conflicts with the perpetuity rule it will be "invalid" in this connection. That an option did create an equitable interest in land and that this interest was subject to the Rule against Perpetuities was laid down in *L. S. W. Ry. v. Gomm* (1882), 20 Ch. D. 562. Jessel, M.R., pointed out (at p. 581): "The right to call for a conveyance of the land is an equitable interest or equitable estate. It appears to me that this covenant plainly gives the company an interest in land". On the facts of the case this point was perhaps unnecessary for the decision but it has been generally accepted in academic circles that some contingent equitable interest in land is created by an option to purchase (Walford, 12 Conveyancer (June 1948) p. 258; Holland, 13 Conveyancer (Sept. 1948) p. 49, citing *Barnhart v. Greenshields* (1853), 9 Moo. P. C. C. 18). The point has now again been judicially confirmed by Wynn-Parry, J., in *Re Mulholland*, [1949] 1 All E. R. 460, where the learned Judge says (at p. 464): "An option confers an immediate equitable interest in the land which is the subject of the option: see *L. S. W. Ry. v. Gomm* (*supra*)". The effect of equitable doctrines here is in some cases to destroy an interest created by an

option by first treating it as conferring a proprietary right and then invalidating it for non-compliance with the Rule against Perpetuities. This result may not do great harm, owing to the alternative remedies of the optioner in contract, but this escape can itself only be called illogical since, as has been abundantly demonstrated by writers on the subject, *e.g.*, 54 S. J. 471, it allows indirect enforcement of something which is recognised as against public policy.

(VIII) For the sake of greater completeness something must be said about a related field of equitable interference, in which, however, there have been no recent cases. This is the rigorous rule that a purchaser of land must pay for the buildings purchased although they are destroyed before conveyance. In *Paine v. Meller* (1801), 6 Ves. 349, the vendor of a house allowed his fire insurance policy to expire at the original date fixed for completion. Completion was delayed and the house was destroyed by fire before conveyance. It was held that the purchaser must pay for the house without reduction. Lord Eldon held: "As to the mere effect of the accident itself no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes". This ruling appears reasonable but places the purchaser in a very difficult position where he is not responsible for the delay, and leaves the vendor less likely to use great care in preventing damage. The Law of Property Act, 1925, s. 47, in effect requires a novation of the policy between the purchaser and the insurers and does not provide the general solution which its terms at first sight suggest. Wherever the section does not apply the property ceases to be covered from the date when the risk passes to the buyer, usually the date of contract, and the insurer ceases to be liable. It is therefore impossible for the vendor to claim the policy moneys and account for them to the buyer. The purchaser has no contract with the insurers and the vendor, being entitled to the full purchase price, will usually be unable to show any loss against which to claim indemnity (*Rayner v. Preston* (1881), 18 Ch. D. 1). The provisions of section 47, inadequate as they are, are a symptom of general professional dissatisfaction with this rule of equity. Where the insurers are brought into relations with the purchaser all interests may be insured, and the purchaser may become entitled to indemnity if the premises are destroyed.

In the United States the rule in *Paine v. Meller* (*supra*) has been equally unpopular and common lawyers there have sought to eradicate it. Unfortunately, once this rule is abandoned, there is a bewildering number of alternative solutions. In the "New England Rule" the vendor remains in risk until the buyer pays the full purchase price (*Wilson v. Clarke* (1880), 60 N. H. 352). In New York State the contract is treated as frustrated if fire occurs before conveyance, and sums already paid are returned (*Brownell v. Board of Education* (1925) 239 N. Y. 369). The various States have adopted widely divergent solutions (see generally Pound (1920) 33 Harvard L. R. 826). Curiously enough, after studying the various possible dates for the passing of the risk, some States have adopted the date fixed for completion, thus in fact ratifying the decision in *Paine v. Meller* (*supra*) though on less technical grounds. A common policy to insure

all interests has much the same effect as a similar arrangement under section 47 in this country (see Simpson (1935) 44 Yale L. J. 737, 760, 766).

(IX) Equity can also be said to have slackened its interest in the original field of equitable relief, that of relief against forfeitures and penalties imposed by individuals. Even here a mathematical or geometrical spirit has dominated the voice of pure conscience. In relieving against forfeiture of a lease or of mortgaged property equity relied on the mathematical certainty of alternative methods of satisfaction, and on the point that the penalty was merely a device to ensure performance of the principal obligation, and itself ancillary to that obligation. It has thus been able to base relief on a presumed intention of both parties, though with doubtful justification in fact, in view of the express contrary indications in the contract itself.

From this preoccupation with mathematical propositions equity seriously limited its relieving jurisdiction. Thus it refused any relief for breach of any covenant other than one for non-payment of rent (*Peachey v. Duke of Somerset* (1724), 1 Str. 447; 2 W. & T. L. C. 212). Exact mathematical demonstration of the adequacy of the alternative performance was impossible, and relief was refused. A hard case was that of covenants to repair, in which case a bill of dilapidations could be drawn up with fair certainty, and damages could always be assessed, for example by a jury in an action for breach of covenant. It is striking that counsel for a landlord in such a case admitted the principle that relief could be given in such cases (*Nokes v. Gibbon* (1856), 3 Drew. 681), stating "where certain damages can be recovered and you put the property absolutely *in statu quo*" relief might be possible. Kindersley, V.-C., refused to interfere with the landlord's enforcement of his rights and did not admit that the possibility of complete compensation was a ground for equitable relief. Kay, L.J., pointed out in a later case (*Barrow v. Isaacs*, [1891] 1 Q. B. 417, at p. 425): "Since the decision of Lord Eldon in *Hill v. Barclay* (1811), 18 Vesey 56, it has always been held that equity would not relieve, merely on the ground that it could give compensation, upon breach of any covenant in a lease except the covenant for payment of rent". The Legislature has thought this unfortunate and statute (now the Law of Property Act, 1925, s. 146) now gives the English Courts discretion to award relief in proper cases for the breach of any covenant where damage is not irreparable, and for the payment of compensation by the tenant. In the United States the legacy of Lord Eldon is forty-eight times as difficult to renounce. The strict rule of equity was upheld by the Supreme Court in *Sheets v. Selden* (1868), 7 Wall (U.S.) 416, at p. 422, and a more recent pronouncement (in *Cesar v. Virgin* (1921), 207 Ala. 148) shows the rule still flourishing in State Courts: "For the reason that no exact compensation can be made, equity will not under ordinary circumstances relieve against a forfeiture arising from a breach of covenant other than a covenant to pay rent".

Equity's solicitude for debtors has been tempered by the great increase in the number of corporate contractors. Great discrepancies in wealth and power are being levelled and the Legislature has assumed responsibility for the welfare of the oppressed. A good example of this

change in attitude is the judgment of Lord Parmoor in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co., Ltd.*, [1915] A. C. 79 : "Where competent parties by free contract are purporting to agree a sum as liquidated damages there is no reason for refusing a wide limit of discretion. To justify interference there must be an extravagant disproportion between the agreed sum and the amount of any damage capable of pre-estimate. It is important that the principle of interference should not be extended." The same note was sounded in *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Co., Ltd.*, [1914] A. C. 25 at p. 35, where the paramount importance of freedom of contract was emphasised. The change in the attitude of equity towards mortgages is an indication of the change in the economic nature of the mortgage. Originating in an emergency loan to a landowner in adversity, at a period when interest was tainted with usury, it has become a common method of investment, by which transactions are financed to mutual benefit. The borrower is not necessarily in distress; usually he is voluntarily purchasing a new piece of property rather than trying to save the old. And he prefers to use his money with better returns in commerce than to discharge mortgages bearing lower rates of interest.

Where a company forfeits shares for failure to pay calls no relief appears to be possible (Companies Act, 1948, Sched. I, Table "A", arts. 33-35). It is only where the company is enforcing a lien for the debts of a shareholder to the company generally that the ordinary principles of relief apply (*Everitt v. Australian Weighing Machine Co.*, [1892] 3 Ch. 506).

In modern company law the same tendency is strongly marked in the law of debentures. Thus, in upholding the indefinite irredeemability of debentures Viscount Maugham stated that: "Loans made to limited companies are very different from loans made to individuals. There is no likelihood of oppression being exerted against the company. There is a great deal to be said in such a case for freedom of contract" (*Knightsbridge Estates Trust, Ltd. v. Byrne*, [1940] A. C. 613, at p. 623).

All these indications of reduced concern with the problem of penalties and forfeitures agreed on by individuals may help to explain the insensibility of equity to forfeitures operating involuntarily under technical rules of law.

(X) *Conclusions.* Recent years have been marked by two dominant strains in equity; a growing disinclination to interfere with the enforcement of penalties imposed by common law, and a fearless application of equitable doctrines at the cost of attracting penal rules which would not have applied had equity not intervened. It is submitted that the first strain is an inevitable symptom of our times. The mantle of grace has now fallen on the all-powerful Legislature which is left to make up the law's inadequacies. The second strain appears less defensible. The mathematical or geometrical aspects of modern equity are inconsistent with the sovereign maxim of equity that "equity acts *in personam*". In disposing of the rights of third parties equity has exceeded its proper sphere and now finds itself in a trackless waste. The Judicature Act, 1873, in fact stripped the Chancery Division of much of the old

"personal" jurisdiction of the Chancellors and, as a result of the Chancery's concern with property law today, it has evolved abstract rigid conceptions like those of the old Court of Common Pleas, ideas which did so much to bring real property law into disrepute. The Chancery is functioning in a field in which legislative interference is still fragmentary and diffident, and yet in which it seems to have abandoned its own past. It must take care that the "*rigor æquitatis*" does not grow, until it reverses the direction of a jurisdiction which once won general and ungrudging praise.

THE PARCELS OF A REQUISITIONING NOTICE

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In conveyancing practice, the principle that parcels should be clearly and fully defined, is in general scrupulously observed. However, when drawing notices exercising the power to take "possession of land" under Defence Regulation 51 (a), "competent authorities" seem often to ignore this salutary rule. We have seen many such notices describing the property requisitioned simply as "the dwelling-house known as 10 Smith Street", or, more verbosely but almost as vaguely, "the land and premises together with the dwelling-house erected on part thereof and known as 10 Smith Street". It seems in these cases only to be customary to make use of a plan where the property requisitioned is vacant land (b).

When it is remembered that possession of the land vests in the requisitioning authority by the mere service of the notice (c) the serious difficulties that may arise from careless draftsmanship in the preparation of these notices become obvious. No doubt in the ordinary case of a requisition of an entire dwelling-house fronting on a public highway repairable by the inhabitants at large, the possession of everything contained by the curtilage of the premises will vest in the authority and access will be obtained by the public right of way. Difficulties will, however, arise in connection with easements, such as rights of way and drainage, etc., where the house requisitioned is situate on a private estate, or is surrounded by land in common ownership which is not itself included in the requisition, or where parts only of a building are requisitioned, such as the first or second floor of a dwelling-house.

(a) Made under the Emergency Powers (Defence) Act, 1939, and continued in force by the Supplies and Services (Transitional Powers) Act, 1945, and extended by the Supplies and Services (Extended Purposes) Act, 1947.

(b) For example, under the Cultivation of Land Order, 1939. The absence of a plan in itself may not be a serious matter if the title to the land is not registered (but see *Re Sherman's Contract*, [1936] 1 Ch. 755), but considerable complications may be caused as a result thereof in the case of registered land.

(c) See *Cramp v. Hughes*, [1944] W. N. 181, and compare the interesting case of *Lewisham Corporation v. Maloney*, [1947] 2 All E. R. 36. In the latter case, it was held that a requisitioning notice need not be registered as a Class D (iii) land charge under s. 10 of the Land Charges Act, 1925, and that "reg. 51, on its true construction, conferred a right of taking possession good as against all the world and not liable to be voided by a failure to take a step—namely, registration—not referred to in the regulation" (*per* Somervell, L.J., at p. 38).

The normal principles under which easements are implied, such as section 62 of the Law of Property Act, 1925, the rule in *Wheeldon v. Burrows* (1879), 12 Ch. D. 419, and the reservation of ways of necessity, are not applicable here, being based on an actual or implied *grant*, whereas requisitioning, *ex hypothesi*, takes effect not by grant from the owner, but by operation of law and in normal cases, contrary to his wishes.

Three questions arise in practice :

- (a) Is there any power to requisition an existing easement?
- (b) If so, can such a right be requisitioned by implication, and without express mention in the requisitioning notice?
- (c) Can an easement or right in the nature thereof be created for the benefit of the requisitioned property?

It is submitted that any easement appendant or appurtenant to the property requisitioned at the time of requisitioning will be enjoyed by the requisitioning authority and its licensees by virtue of the requisitioning. "Land" for the purposes of the Defence Regulations, possession of which may be taken under Regulation 51, "includes land covered with water, and parts of houses and buildings" (d), and under section 3 of the Interpretation Act, 1889, the expression must also be deemed to include "messuages, tenements and hereditaments, houses and buildings of any tenure". Easements, in spite of Challis' doubts (e), are incorporeal hereditaments, and it seems therefore that possession thereof may be taken under the Regulation. Moreover, Regulation 51 (2) (a) puts the requisitioning authority in the shoes of an owner of land and thus appears to confer a right to enjoy existing easements exercisable by the owner.

Where the desired easement did not exist prior to the requisition, it is doubtful whether such will be acquired by the requisitioning authority without special mention in the parcels to the notice, such, for example, as a right of access over a private road where the requisitioned property is severed from other property in common ownership. The principle of *Corporation of London v. Riggs* (f) cannot be invoked to create a way of necessity, where no grant can be involved; for the same reason no right of support by an adjoining house belonging to a common owner can be implied. No person may obstruct the requisitioning authority in its act of taking possession of the land (see Regulation 51 (1A)), but there seems to be no provision in the Regulation enabling the authority to insist on the owner granting a way of necessity, in order that the authority and its agents may have access to and from the premises of which possession has so been taken. It is submitted that the provision in Regulation 51 (2) (a), entitling the authority to "do . . . in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest", is not wide enough to cover this point, for an implied way of necessity exists, in an appropriate case, not by virtue of the interest of the grantee in the land itself, but as a term of a voluntary conveyance.

(d) See Regulation 100.

(e) *Real Property*, 3rd ed., p. 51.

(f) (1880), 13 Ch. D. 798.

On the other hand, the implied reservation is a fiction—the grantor retaining a landlocked close has not in fact reserved any right of access to the property retained, but the law does not tolerate absurdities and therefore implies such a reservation in his favour. It is not, however, clear that the principle “the law does nothing in vain” can be applied to a case of requisitioning, and whether it is sufficiently efficacious to overcome the restrictive interpretation of the exercise of a statutory power to take a subject’s land against his will. The point did not arise for decision, but in *Lewisham Corporation v. Roberts* (g) it was tacitly taken for granted by both counsel and the Court that the requisitioning authority could not claim as of right any access or way of necessity to a requisitioned upper flat, where such had not been reserved at the time of requisitioning.

It seems that these difficulties in practice arise from a perhaps unconscious confusion between the act of requisitioning, which vests possession only in the acquiring authority, and a conveyance *inter vivos* vesting the legal estate in the grantee. Possession has been in some contexts equated with ownership or title (h) but the distinction is fundamental and cannot be ignored. Possession, not title, alone can be acquired by the act of requisitioning, and the acquiring authority can rely only on the terms of the statute, which it is submitted, must be construed strictly (i).

These problems have had an added significance since the general delegated requisitioning powers of local authorities have been withdrawn (j), and can be exercised only with the *ad hoc* permission of the “competent authority”. The obvious method of curing an originally defective requisitioning notice of the type above mentioned, namely by issuing a fresh requisitioning notice (k), may not now so readily be available. It may well be, indeed, that the further exercise of requisitioning powers will shortly not be available at all, premises already held under requisition being nevertheless retained for some time. Even if power were delegated to grant a new notice having a curative effect it seems that this would not have retrospective operation (l).

(g) [1949] 1 All E. R. 815.

(h) Compare *Titchbourne v. Weir* (1892), 8 T. L. R. 713, wherein the new title was held to be free from positive covenants formerly binding on the old title barred by lapse of time.

(i) It is a general principle of statute law interpretation that such powers should be construed restrictively in favour of the subject; see, e.g., *Re Bowman*, [1932] 2 K. B. 621; *David v. De Silva*, [1934] A. C. 106; *Consett Iron Co. v. Clavering Trustees*, [1935] 2 K. B. 42; and *Maxwell on the Interpretation of Statutes*, 9th ed., p. 290.

(j) See circular 106/48 of the Ministry of Health dated June 25, 1948.

(k) As was adopted in *Lewisham Corporation v. Roberts*, *supra*.

(l) See, e.g., *Re Pulborough School Board Election*, [1894] 1 Q. B. 737.

NOTES OF RECENT CASES

1. LAW OF PROPERTY AND CONVEYANCING CASES

Contract for sale—damages for repudiation—rescission.—*Thorpe v. Fasey*, [1949] 2 All E. R. 393, turns, as most of these cases do, upon its special facts and the construction of the particular contract, but it does contain some examination of principle. A contract for sale made in 1937 provided that 157 acres should be bought for £38,000 and that completion should take place by instalments. The first instalment was completed and some forty acres were conveyed to the purchaser. Owing to the intervention of the war completion of the remainder had not taken place. The vendor did not claim specific performance but damages or, alternatively, rescission. The claim for damages was based on a common law claim for repudiation of the contract. The letters after the war demanding completion had also included a willingness to accept any other suggestion that the parties could agree. The Judge held as a fact that this inclusion prevented an out and out demand for completion and the contract did not make time of the essence of the contract. The Judge also held, as a matter of construction, that the contract to purchase the 157 acres was one and not several contracts to be completed separately.

Wynn-Parry, J., then held that:—

(i) the rules for repudiation of a contract were the same whether by way of anticipatory breach or after the time for completion was past, because, of course, the date for completion is not in equity of the essence of the contract. In order that there shall be repudiation it is necessary to show that there has been absolute renunciation of the contract by one party. The correspondence in this case did not bring “to the mind of the purchaser, so long as they were in communication with each other, that if he did not pay the last instalment to the vendor the contract was at an end”: *per Webster, M.R.*, in *Cornwall v. Henson*, [1901] 2 Ch. at p. 302. Consequently, the claim for damages failed.

(ii) In order that rescission may be granted, it is necessary to be able to rescind the whole contract and so enable the parties to resume the *status quo*. Since, therefore, the contract was to be treated as single and a conveyance of part of the land had already taken place, it was not possible to rescind the contract *in toto* and the claim for rescission also failed.

It is thought that there is no new law in this case, but the authority on both points is not large and it is convenient to have a modern decision stating the position. It also brings out the dangers of litigation on this topic, unless well within the existing authorities.

(Williams' V. and P., 4th ed., pp. 994, 1006.)

Contract for sale—specific performance refused—return of deposit—costs.—*Finkelkraut v. Monohan*, [1949] 2 All E. R. 234, is worth considering as a comedy of errors, but it is difficult to compress all the relevant facts into a short note. The case arose out of a sub-sale in which the original engrossment of the conveyance contained errors and the contract

was not completed on the date specified in a notice served by the sub-vendor on the purchaser. In cross-actions by the vendor for specific performance and the purchaser for rescission and recovery of the deposit Danckwerts, J., held that as the vendor was unable to complete on the date named in her notice to complete she was in default and could not get a decree for specific performance. The learned Judge also held that under the Law of Property Act, s. 49 (2), the deposit should be returned, because specific performance had been refused and it was a case in which the discretion should be exercised in favour of the purchaser.

It is also important to draw attention to the fact that costs were not awarded to either side. The ground of this refusal was that in his opinion the solicitors for both parties were in fault, first for error in dealing with the draft conveyance and secondly for lack of co-operation in trying to settle the matter on a friendly basis.

Covenant running with the land at law—benefit passing in freehold—section 78, L. P. A.—Smith v. Douglas River Catchment Board, [1949] 2 All E. R. 179, is a very important case both for the analysis of the cases and the decision. The defendant Catchment Board entered into an agreement with the owner of some land for maintaining the banks of a river. It was held as a fact that this agreement was broken. Action was brought by (i) a purchaser, and (ii) a lessee of the land. It was argued on behalf of the Board that (a) this was an agreement which did not run with the land, (b) it could not bind a person who never had any interest in the land, and (c) was not enforceable by a person who was not a party to the agreement but was only a purchaser or lessee. The Court of Appeal held (overruling Morris, J.) that the covenant was one which touched and concerned the land and so the benefit could run with the land at law, that it was immaterial that the covenantor never had any interest in the land affected, and that a purchaser or lessee could take the benefit notwithstanding that they were not mentioned because they were persons "deriving title under the covenantee" within the meaning of section 78 (1) of the Law of Property Act, 1925. Incidentally, as a matter of construction it was held that it was not a defence that the precise land did not appear by description in the agreement on the principle *id certum est quod certum reddi potest*. But the importance of the case turns upon the position of section 78 (1), though Denning, L.J. (at p. 189), points out that the benefit might be claimed under section 56 of the Law of Property Act.

This case makes clear the value of section 78 where there are no words limiting the application of the covenant. The covenant can be enforced by successors in title and persons deriving title under successors in title. It may be doubted whether it is desirable to incorporate into covenants in conveyances special words, such as executors, administrators and assigns, in connection with covenants, but leave it either to the Act or else to use the words of the Act.

The case, however, also is an illustration of what is meant by "touching and concerning" land, since all the learned Lords Justices agreed that this was necessary for the benefit of the covenant to run with freeholds at law. It touches and concerns, apparently, if it affects the mode of occupation or *per se* the value of the land.

Two further points should be noted. First, it was generally thought that where the benefit of a covenant ran with freeholds it was only enforceable by those holding the same estate in the land and not if a mere lessee. According to Denning, L.J. (at p. 189), this rule was altered by section 78 of the Law of Property Act, and this appears also to have been the view of

the other learned Lords Justices, but Lord Justice Denning assisted his interpretation by reference to section 56. It is conceivable that this decision may come up for review, though it is so valuable it is hoped that it will stand.

Secondly, Denning, L.J., cast some doubt upon the extent of the principle that only those who are privy to a contract can enforce it. He points out that this rule is comparatively modern and does entirely supplant the older and more fundamental rule that a deliberate promise under seal or for valuable consideration must be kept. It is thought that more may also be heard of this.

2. CHARITIES

Legacy to hospital—not paid before National Health Service Act came into force—cy-pres.—In *Re Kellner's Will Trusts*, [1949] 2 All E. R. 43, Harman, J., decided that where a legacy was payable to a "teaching hospital" before the Appointed Day but had not been paid no provision was made for its destination under the complicated property provisions of the National Health Service Act, 1947. He, therefore, held that the hospital could not claim the payment of the legacy, since the Act had dissolved the old hospital body and created a new one: see section 78 (1) (c). On the other hand the legacy had become payable to a charity which had ceased to exist before payment was made and, therefore, was impressed with a charitable trust. Hence the legacy had to be applied *cy-pres* under a scheme: *Re Slevin*, [1891] 2 Ch. 236.

This decision relates only to "teaching hospitals", which are on a different footing from other hospitals in that they retain a measure of independence under the Act. Hence, separate provision has to be made in the Act for the vesting of their property and no doubt this is how the *casus omissus*, as the learned Judge found it to be, occurred. Nevertheless, it is important to observe that even in other cases the case provides judicial authority for holding that the old hospital body has ceased to exist. This may be most important in connection with other gifts and grants than those in point in this case.

(Tudor, p. 158.)

Relief of poverty—necessity of public element.—Of recent years decisions have tended to emphasise the importance of the "public element" in the character of charitable trusts. Trusts for the advancement of education (*Re Compton*, [1945] Ch. 123) and for the advancement of religion (*Gilmour v. Coats*, [1949] 1 All E. R. 848) have both been held invalid for want of the public element, though otherwise clearly falling within the scope of charity. This element has, of course, always been dominant in the celebrated fourth head of Lord Macnaghten's well known classification of the objects of charity. The question has now been discussed by Harman, J., in *Gibson and Another v. South American Stores, Ltd.*, [1949] 2 All E. R. 18, in connection with gifts for the relief of poverty. The question arose because a company had a scheme whereby two per cent. of their profits were set aside for the "Employees' Health and Relief Fund", under which gratuities, pensions and allowances could be granted. The fund having always been more than sufficient for the

purpose, the company now wished to revoke the trusts. The learned Judge held that upon the construction of the trusts it was imperative for any beneficiary to obtain a benefit under the trusts that he should be "necessitous and deserving", whether the beneficiary was an employee, ex-employee or dependant. Consequently, the trust was for the relief of poverty.

In the course of argument it was apparently suggested, on the authority of the "poor relations" cases, that the public element was not necessary to cases for the relief of poverty. The learned Judge expressed the opinion that he was unable to adopt this suggestion, and continued (at p. 23): "the explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories. The law may well (as Lord Greene, M.R., suggested in *Compton's Case*) consider that to relieve even one man's poverty is a benefit to the whole community, while to relieve his ignorance or to minister to his ungodliness is not such a benefit, and similarly with the miscellaneous objects in the fourth category". The learned Judge then held that the objects of the trust were wider than those of some decided cases in which the charity had been upheld and consequently that in this case the objects were charitable. Consequently, the trusts could not be revoked.

It is also clear that trusts for the benefit generally of members of a firm, even in cases of air raid distress (*Re Hobourn Aero Components*, [1946] Ch. 194), or by way of education (cf. *Re Compton, supra*), are not charitable unless and until it can be shown that the beneficiaries must be *necessitous*. It may become a problem to determine what constitutes poverty.

Purposes "beneficial to the community".—Re Strakosch, [1947] 2 All E. R. 607 (*ante*, Vol. 12, p. 141), had been affirmed in the Court of Appeal, [1949] 2 All E. R. 6. It was held not a charitable purpose "to strengthen the bonds of unity between the Union of South Africa and the mother country and which, incidentally, will conduce to the appeasement of racial feeling between the Dutch and English speaking sections of the South African community". The trustees had a discretion to dispose of the fund for any objects which might fulfil this purpose and the Court held that these objects might be of a non-charitable character.

The Court had before them an affidavit by Field Marshal Smuts (not before the Court of First Instance) to the effect that the proper methods to achieve these objects would be by education. Nevertheless, the Court held that the trustees would not be confined to these methods and so the gift failed as a charity.

The case is of considerable importance for its analysis of the type of gift, such as a gift to a locality without specification of purpose, and this particular gift. Lord Greene, M.R. (at p. 9), in delivering the judgment of the Court, expressed the view that the former type of gift had implicit in it charitable purposes. In his opinion *Tudor on Charities*, 5th ed., p. 45, is wrong in suggesting that such a gift could be expended on any purpose which was not charitable. Consequently, the assumption sometimes made that a gift of doubtful validity as a charity may be saved by being confined to a locality appears to be unsound. The learned Master of the Rolls did not deny that some of the cases or statements in the cases may justify the view expressed in *Tudor*, but in the light of the analysis it is thought that this view must be abandoned. The effect of this appears to be that where a gift is made to a locality, whether it be to "my country" (*Re Smith*, [1932] 1 Ch. 153), or to "my parish" (*West v. Knight* (1669), 1 Cas. Ch. 134), the gift can be applied only to those purposes which are within the "spirit and intendment" of the statute 43 Eliz. c. 4, and if any

purposes are annexed to the gift which are not within this "spirit and intendment" it cannot be charitable. It is immaterial how beneficial to the community the purposes may be; they must be "legal charity" if they are to be effective.

(Tudor, p. 45.)

3. WILL CASES

By A. K. R. KIRALFY, LL.M., of Gray's Inn, Barrister-at-Law

Will—disposition—purpose trust without human beneficiaries.—The recent decision in *Re Wood, Barton v. Chilcott*, [1949] 1 All E. R. 1100, raises a fundamental point. A fund had been bequeathed for the purpose of contributing to the B.B.C.'s "Week's Good Cause". Not all these "causes" are charities in the legal sense. There are also a number of "causes", varying with the different Regions, so that the trustees would have had to select one of these each week. Harman, J., held the bequest to be ineffective.

The decision has been criticised on good grounds for failing to consider another series of cases, those in which executors have been directed to support a testator's dogs or horses (*R. E. Megarry* in 65 L. Q. R. 304). As the cases stand it is possible for a testator to direct his executors to use his estate for a period of not more than twenty-one years for such purposes (e.g., *Re Thompson*, [1934] Ch. 342). Harman, J., may have been thinking of his own judgment in the recent case of *Re Cook*, [1948] Ch. 212, which included the words, "You cannot have a trust existing when nobody is interested under it except the trustee, because nobody can enforce it". But in the "animal cases" there is an indirect means of control. If the executor fails to apply the property to the support of the animals the legatees under the will can apply to have the property transferred to them under a resulting trust.

On the other hand, there is a strong case for the decision of the learned Judge in *Re Wood (supra)* in the following sense. There is no imperative duty to support the animals and the executor may turn the property over to the residuary legatee with impunity. Does such a gift qualify as a "trust" in the technical sense? *Theobald on Wills* (10th ed., p. 92) criticises the "animal cases" and concludes that "a trust which cannot be enforced is invalid". It is certainly difficult to fit this type of case within such definitions of trust as that given in Underhill (*Law of Trusts*, 9th ed., p. 3): "A trust is an obligation binding a person to deal with property over which he has control for the benefit of persons, etc.".

How has it proved possible to establish a "trust" which is not a "trust"? The answer is that the law of trusts has become the involuntary receptacle of the anomalies of other branches of law. These anomalies stand in the way of any systematic law of trusts. Thus, the rule in the "animal cases" is difficult to reconcile with the reasoning of the well-known rule in *Saunders v. Vautier* (1841), 4 Beav. 115, which treats the persons with vested enforceable interests as entitled to ignore the directions given by the settlor, e.g., they may take a gift at once although the settlor directed a postponement, provided no other person (cf. *Re Couturier*, [1907] 1 Ch. 470, 474) is given the intermediate income.

A philanthropic desire to enforce a peculiar customary profit led the House of Lords, in *Goodman v. Mayor of Saltash* (1882), 7 App. Cas. 633, to

introduce the anomaly of the "Territorial Trust" into the law of charitable trusts, an anomaly which cannot be excised, though it has been deprecated by Lord Simonds in the recent case of *Re Williams's Trusts*, [1947] A. C. 447.

The expedient of a "trust" has been used to try to create a third-party right to enforce a contract (e.g., *Walford's Case*, [1919] A. C. 801; cf. *Re Miller*, [1947] Ch. 615). But this conflicts with the "certainty of trust property" usually considered essential to any trust. Professor Corbin, of Yale University, pointed out (46 L. Q. R. (1930) 12, p. 45): "It may well be that the expansion of the trust concept to include cases such as this is an instance of the growth of law by fiction". Professor Corbin, a great common lawyer, welcomed the development, but saw the inconsistency with the principles of equity, saying (p. 40): "Nothing is held in trust by the promisor, and no property or money is to be paid to the promisee or is to be held by him as a trust fund", and (p. 42) "Until payment by the insurer there is no property or fund that is held in trust by anybody, either the insurer or the promisee".

A final reference may be made to the notion of a "power in the nature of a trust". The same ends as are achieved in this country by this doctrine may be achieved by simply treating it as a case for implying a gift to the objects of the power equally in default of appointment. (Cf. *American Restatement of Property*, para. 367 (2).) Professor Walsh emphasised (*Commentaries on Real Property* (1947), Vol. 3, p. 289): "If the will by clear implication expresses the intent that they so take the property the impressing of a trust is entirely superfluous, as they take in equal shares by the operation of the will".

(Theobald, p. 92.)

Will—secret trust—repugnancy.—Re Spence, Quick v. Ackner, [1949] W. N. 237, turned mainly on the question of inconsistency between the will and the communication of the trust. The will referred to a past communication. In fact, no precise communication was made until after the will. The beneficial interest therefore passed as on intestacy. The subject of secret trusts is one where generalisations are dangerous, and one where the Courts cannot be blamed for finding the quick solution. A problem which might have had to be faced in this case was this: is it equitable to enforce the trusts of the original communication made before a will, if the testator has purported to change them after the will? No doubt the solution will be to say that the original trusts were tentative and also unenforceable. Is this, however, consistent with the view that secret trusts are really "inter vivos" trusts?

(Theobald, p. 63.)

*Will—formalities—testamentary intention—Wills Act, 1837, s. 9.—*The problem of "animus testandi" is interesting, and not often raised. In *Meynell v. Meynell*, [1949] W. N. 273, a solicitor apprehended that his client might die suddenly. He therefore took the precaution of having the instructions for the client's will signed and attested. The client in fact died before the formal will was ready. It was held that the instrument was a valid will as it had been intended to operate as such in the event which had occurred.

(Theobald, p. 28.)

Will—formalities—blind witness—Wills Act, 1837, s. 9.—*Theobald on Wills* (10th ed., p. 30) states that a will must be signed “in the actual visual presence of both witnesses”. In *Re Gibson*, [1949] 2 All E. R. 90, a will was held invalid because one witness was blind. Pearce, J., stated that the signing of a will was a “visible matter”, and that a witness to it must have the faculty of sight.

(*Theobald*, p. 30.)

Will—formalities—evidence of attesting witnesses—Wills Act, 1837, s. 9.—*Re Vere-Wardale*, [1949] 2 All E. R. 250 raised another point on which, as Willmer, J., put it, “there is not a wealth of authority”. Where the two attesting witnesses testify that the will was not validly executed, because they signed before, and not after, the testator, is evidence admissible in contradiction? Lord Penzance had assumed it was (*Wright v. Rogers* (1869), L. R. 1 P. & D. 678) and it was so stated in *Mortimer on Probate*, 2nd ed., p. 127. Willmer, J., held that he would be defeating the objects of the section by excluding such evidence, “If I am to exclude further evidence it seems to me that such a ruling can only increase the possibility of the perpetration of fraud”. The learned Judge also deprecated the idea that any one form of attestation clause was favoured, and approved a form taken from *Key and Elphinstone's Precedents* (14th ed., vol. 2, p. 953).

(*Theobald*, p. 65.)

Will—revocation by marriage—exercise of power of appointment—Wills Act, 1837, s. 18.—The Wills Act provides that marriage only revokes the exercise of a power of appointment by will if the gift in default is in favour of the testator's statutory next of kin. In *Re Gilligan*, [1949] 2 All E. R. 401, the widow of the testator was not, under the terms of the power, entitled in default. Pilcher, J., held that this prevented the revocation of the appointment by the testator's marriage, “I think that the intention of the section was that a will exercising a power of appointment should only be wholly revoked by the subsequent marriage of the testator in those cases in which the instrument creating the power provides that in default of appointment the fund shall devolve as on an intestacy, in which event the widow of the deceased will take her portion of the fund”. The effect of the Administration of Estates Act, 1925, s. 50 (1) was to make the references to statutory next of kin in Wills Act, 1837, s. 18 now read as references to persons entitled under the Administration of Estates Act.

(*Theobald*, p. 36.)

Will—County Court Probate Jurisdiction—County Courts Act, 1934, s. 60 (1).—*Re Thomas*, [1949] 1 All E. R. 1048, decides a simple but extremely important point, that a county court can pass on the validity of a will, within the limitations of its jurisdiction over small estates, and is not restricted to the actual grant of probate. A number of statutes were examined but none of them justified the argument that this jurisdiction had been affected.

Legacy—intermediate income—express direction.—Wherever there is a direction that income of a legacy to an infant may be used to maintain the legatee interest runs from the death of the testator. In *Re Selby-Walker*, [1949] 2 All E. R. 178, it was held that the same result followed where the legacy, though only payable at twenty-one, could be devoted to the legatee's education (*Re Churchill*, [1909] 2 Ch. 431, was followed).

(Theobald, p. 139.)

Legacy—satisfaction of annuity—identical amount—direction to pay debts.—In *Re Manners*, [1949] 2 All E. R. 201 (C. A.), a testator had covenanted in 1937 to pay his wife an annuity of £250. In July, 1944, he executed a will leaving £5,000 on trust to purchase a £250 annuity for his wife, and for certain other objects. It was held that the wife was entitled to both amounts. Sir Raymond Evershed, M.R., pointed out that the presumption of satisfaction which arose from the identity of the two amounts was rebutted by several circumstances. One of these was the direction to pay debts which occurred in the will. The learned Master of the Rolls refused to limit the meaning of "debt" in any way and held, "It seems to me impossible to say that a direction to pay debts was not intended to comprehend all kinds of contractual obligations to which the testator's estate was subject". The words "give and bequeath" which preceded the direction to purchase an annuity also suggested a voluntary gift, rather than the discharge of an obligation. Finally, the fund, out of which the annuity was to be raised, was severed from residue. If the bequest of the annuity failed that would enure in favour of the other persons entitled to the fund, and would not benefit the residuary legatee primarily liable to pay the existing annuity under the covenant.

(Theobald, p. 543.)

Construction—absurdity—words supplied.—The Courts have been quite liberal in adding to the words of a will in a proper case in recent years. *Re Smith*, [1948] Ch. 49, is an example. A similar case is *Re Birkin*, [1949] 1 All E. R. 1045. There the testator made gifts by name to all his nephews and nieces other than the children of his sister L. Finally, he made a gift to "the nephews and nieces of my sister L.". Taking this literally, it simply increased the gifts already made, and there seemed no point in referring to L. at all. The Court held that the testator clearly meant to benefit all his nephews and nieces, had forgotten the names of L.'s children, and meant to write "nephews and nieces, children of my sister L.".

(Theobald, p. 535.)

Construction—"die without issue"—date to which referable.—The Wills Act, 1837, s. 29, does not apply to all possible references to death without issue. But in *Re Williams's Will Trusts*, [1949] 2 All E. R. 11, a clause of accruer in the event of a daughter dying "without lawful issue her surviving" was held also to refer to the moment of the daughter's death, and not to any other time, such as the death of the widow who took a prior interest. Roxburgh, J., probably had Law of Property Act, 1925,

s. 134, in mind when he added, "It is curious that the declaration would operate to defeat a daughter's interest even if she had issue who attained twenty-one, if that issue failed to survive her. That is certainly curious, but it is not, in my judgment, a sufficient ground to enable me to say that the words do not mean what they say".

(Theobald, p. 498.)

4. LANDLORD AND TENANT CASES

By J. MUIR WATT, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—lease by mortgagor where mortgagor's statutory power of leasing is excluded—tenancy not protected—decision of Court of Appeal.—The opinion was expressed in these Notes for June, 1949, that the decision of Vaisey, J., in *Dudley and District Benefit Building Society v. Emerson*, [1949] 1 All E. R. 691, was open to doubt. It has subsequently been reversed by the Court of Appeal, [1949] 2 All E. R. 252. The case was one where a mortgagor, whose statutory power of leasing under section 99 (1) of the Law of Property Act, 1925, was expressly excluded, created a tenancy subsequently to the mortgage. Vaisey, J., held that the mortgagor's tenant was protected against the mortgagee under the Rent Restrictions Acts. His decision was based on the ground that the tenancy created by the mortgagor was "lawful". The Court of Appeal have now decided that the "lawfulness" of such a tenancy by no means carries with it the consequence that it is protected against the mortgagee. The true position is that the mortgagor's tenant in such a case has a lawful but defeasible interest, which is defeated by the mortgagee's assertion of his paramount title. The Rent Restrictions Acts are designed to protect tenants against their landlords or persons whom the Acts place in the same position as landlords. The mortgagees in the present case were not landlords or in a position analogous to landlords. The wide definition of "landlord" in section 12 (1) (g) of the 1920 Act must be read subject to some reasonable limitation. It may have been intended to cover the position of a superior landlord *vis-a-vis* a sub-tenant, who is given a special protection by sections 5 (5) and 15 (3) of the 1920 Act, or, possibly, the position of a landlord in relation to a statutory tenancy. The result was that there was nothing in the Rent Restrictions Acts to displace the rule above mentioned that the mortgagees could, by asserting their paramount title, put an end to the lawful but defeasible interest of the mortgagor's tenant.

The Court reserved the point whether the result would have been the same if the mortgagor had determined the contractual tenancy which he had created, so that it had become a statutory one before the mortgagees asserted their title. It is submitted that the result would have been the same. It is important not to be misled by loose phrases, such as that a statutory tenant has a right good against all the world. Though a statutory tenancy is "something of a jurisprudential curiosity", there are limits to its efficacy. There is no reason to hold that a contractual tenancy which is defeasible by the assertion of a paramount title to that of the landlord becomes indefeasible in relation to such a title by being converted into a statutory tenancy. A person who asserts such a title is not claiming as landlord at all. If, in the present case, the tenancy had become a statutory

one, surely the mortgagees would have been on strong ground in saying that neither the contractual tenancy nor any statutory prolongation thereof could avail against their superior title.

Rent Restrictions Acts—meaning of the expression “the Acts operate *in rem*”—does not mean that judgments under the Acts are “judgments *in rem*”.—It is frequently said that the Rent Restrictions Acts “operate *in rem* and not *in personam*”. This is a somewhat loose expression and appears to mean that the Acts confer a status upon a dwelling-house from which legal consequences follow and do not merely affect particular individuals or a particular tenancy. The authority usually cited is *King v. York* (1919), 88 L. J. K. B. 839. Greer, L.J., in *Lloyd v. Cook*, [1929] 1 K. B. 103; 97 L. J. K. B. 657, at p. 675, put it thus: “Since the decision in *Barrett and Evans v. Hardy Brothers (Alnwick)* it has always been considered that the Rent Restrictions Acts operate *in rem* by attaching to a dwelling-house a standard rent which applies to the whole house, and, where necessary, also applies by apportionment to every part”.

The Court of Appeal have now made it clear, in *Lazarus-Barlow v. Regent Estates Co., Ltd., and Another*, [1949] 2 All E. R. 118, that the statement that the Rent Acts operate *in rem* is by no means the same as the proposition that judgments under the Acts, *e.g.*, a judgment determining that a dwelling-house is outside the general provisions of the Acts because the rent includes payments in respect of attendance or furniture, are judgments *in rem*. The characteristic of judgments *in rem*, as distinct from judgments *inter partes*, from the point of view of the doctrine of estoppel by matter of record, is that whereas the latter are only binding as between the parties thereto and those who are privy to them, the judgment *in rem* of a Court of competent jurisdiction is conclusive against all the world in whatever it settles concerning the status of the subject of the determination. Familiar examples of judgments *in rem* are the judgment of a Prize Court condemning a vessel as prize, a Divorce Court dissolving or establishing a marriage, or an order for the dissolution of a company. In the case of *Lazarus-Barlow* a flat was let to one Kerner on September 1, 1939, at a rent of £165 a year. In an action for ejectment in 1945 Lord Caldecote, C.J., decided that the letting to Kerner was outside the general provisions of the Rent Acts on the ground that the rent included the value of attendance which formed a substantial portion of the whole rent. This decision was, on the facts, clearly inconsistent with the leading case, decided subsequently, of *Palser v. Grinling*, [1948] A. C. 291, but of this more will be said later. In 1945 the flat was let to the plaintiff in the present action at £280 a year. The plaintiff now contended that the standard rent was £165 a year and that Lord Caldecote's decision was (1) not binding on her, and (2) erroneous. The Court of Appeal held that Lord Caldecote's judgment was not binding on the present plaintiff and rejected the argument that it was in the nature of a judgment *in rem*. Lord Greene, M.R., admitted that he was at one point attracted by this argument, but after consideration the Court were unanimous in rejecting it. Lord Caldecote's judgment was a judgment *inter partes*, raising an estoppel only against the parties to it and their privies, *i.e.*, those claiming or deriving title under them. So far as the present plaintiff was concerned it was *res inter alios acta*. Evershed, L.J., pointed out some of the difficulties to which a contrary conclusion would lead:—

“If, however, the principle for which the defendant companies contend be admitted, where and how is the line to be drawn? If there had been no *Kerner* judgment in the present case, would a determination

of the character of the Kerner letting and, consequently, of the standard rent made in the present proceedings between the plaintiff and the defendants bind future tenants not deriving title from the plaintiff? What of a judgment capable of being shown to be based on some manifest error of fact, for example, an erroneous entry in the rate books of a rateable value? Would a judicial determination that certain premises were not within the Acts made in proceedings between a vendor and purchaser bind future tenants? Would a judicial determination between a landlord and occupier that the latter was not a tenant but a licensee bind a rating authority?"

The Court refused, however, to determine the standard rent themselves, although invited by the plaintiff's counsel to say that it was £165 per annum. They remitted the matter as *res integra* to the County Court to determine, but expressed the view that Lord Caldecote's decision in the *Kerner* case could not be reconciled with *Palser v. Grinling*. They, therefore, directed the County Court Judge to apply to the facts as he found them the principles laid down by the House of Lords in *Palser v. Grinling*. Lord Caldecote had gone astray in thinking that the word "substantial" in section 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, meant "not trifling" or "something which can be recognised and ascertained and quantified". The House of Lords have explained that "substantial" in this context means "considerable, solid, or big", as in speaking of a substantial fortune, a substantial meal, a substantial man, or a substantial argument ([1948] A. C. 291 at 317).

The present decision will necessitate some limitation of the interpretation given in certain of the textbooks of the expression "the Acts operate *in rem*".

(Rent Restrictions Guide, 2nd ed., p. 10.)

*Rent Restrictions Acts—transfer of burden to landlord—increase of cash rent—terms not less favourable to tenant than previous terms—meaning of "burden" and "terms".—In Seaford Court Estates, Ltd. v. Asher, [1949] 2 All E. R. 155, the Court of Appeal shed some further light on section 2 (3) of the 1920 Act, the true interpretation of which had, as Lord Greene, M.R., pointed out (p. 157), been left by the authorities in some obscurity. The case arose on the second part of section 2 (3), which provides that "... any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act". The facts were that a flat of which the standard rent was £175 per annum was re-let at £250 per annum, the difference between the terms of the letting which established the standard rent and the terms of the later letting being that the later letting included a covenant by the landlords, which was absent from the earlier, to do various things the most important of which was to provide hot water. The landlords had *in fact* been doing these things during the earlier letting, but they had not then been under any legal obligation to do so. The County Court Judge, an appeal from whose decision was allowed, held that, as the landlords had in fact all along performed the services in question, there had been no "transfer of a burden or liability" from the tenant to the landlords within the meaning of section 2 (3). The judgments in the Court of Appeal clearly establish two propositions: (1) that the change of "terms" means a change of legally binding terms; (2) that the change of terms must result in, or be the result*

of, a transfer of a burden or liability from the one to the other. "Liability" means a legally enforceable liability, but "burden" has a wider significance. It need not be a contractual burden. In the present case there was no transfer of a liability since the tenant was under no such liability. He was, however, previously under a "burden", in the sense of a contingent burden of providing the hot water himself or going without if the landlord should cease to provide it. Under the new terms that burden was definitely assumed by the landlord as a legal liability. Until then the landlord was legally free to refuse to continue to provide hot water unless he was paid a contribution towards the increased cost.

This decision supplements, and to some extent clarifies, those in *Winchester Court, Ltd. v. Miller*, [1944] K. B. 734, and *Property Holding Co., Ltd. v. Clark*, [1948] 1 K. B. 630. In the present case the landlord assumed as a legal obligation what had been merely a contingent burden on the tenant. In the earlier cases the landlord or the tenant was relieved of a legal obligation which the other party was likely to assume as a matter of practical necessity, or even of mere prudence or expediency, although he undertook no legal liability. In *Clark's Case* Evershed, L.J., used some expressions which suggested that the transferee must not only be likely to undertake the burden of which the transferor is relieved, but must actually do so. Asquith, L.J., in the present case, with the concurrence of the other members of the Court, has made it clear that in so far as Evershed, L.J., meant to suggest this (and his words can be otherwise explained) the suggestion cannot on reflection be supported.

Incidentally, Denning, L.J., gave felicitous expression in this case to the liberal view of the construction of statutes. It is to be hoped that his remarks will not be quoted as authority (which they are not) for undue licence in interpretation.

The order of the Court was that the case was to be remitted to the County Court Judge to determine whether, and, if so, to what extent, the burden transferred to the landlords was over-valued at £75.

(Rent Restrictions Guide, 2nd ed., pp. 40-41.)

Rent Restrictions Acts—statutory corporation not agent or servant of the Crown—Transport Commission bound by the Acts.—In *Tamlin v. Hannaford* (1949), 65 T. L. R. 422, a point of considerable constitutional interest was decided in the course of determining whether the sub-tenant of part of a house could claim the protection of the Rent Restrictions Acts against the tenant of the house, who held from the British Transport Commission as successor in title to the Great Western Railway Company. The Court of Appeal held that the sub-tenant was entitled to rely on the Acts, reversing the County Court Judge's decision that the British Transport Commission was an agent of the Crown and that, therefore, the house was Crown property and thus outside the Acts.

Owing to the increase in the number of public corporations which are in some sort of loose relation with the Government, this decision is of importance both in rent restriction law and beyond it. In the present case the Court of Appeal pointed out that, although under the Transport Act, 1947, the Minister of Transport had wide powers of control over the Commission, including the power to give it directions which it must obey, this did not make the Commission his agent any more than a company is the agent of its shareholders, or even of a sole shareholder. The Court contrasted the position of the Central Land Board, which, by virtue of the express provision of section 3 (3) of the Town and Country Planning Act, 1947, exercises its functions "on behalf of the Crown".

The matter is clearly one which depends upon the particular provisions of the statute under which the Corporation is created, and no general rule can be laid down. It is satisfactory that the Court of Appeal have expressed their distrust of the picturesque but vague phrase "emanation from the Crown", which had crept into the cases. The question is whether the Corporation is properly to be regarded as the servant or agent of the Crown. It is, therefore, possible that the determination of the status of a humble dwelling may turn on high questions of constitutional theory and that difficulties may arise in classifying some of the more loosely-knit political forms which Parliament, with its empirical approach to problems of organisation, may evolve.

(Rent Restrictions Guide, 2nd ed., pp. 7 and 10.)

Rent Restrictions Acts—scope of section 9 of 1920 Act—three possible constructions—one construction now ruled out—section applies where furniture is sufficient in value to exclude the general provisions of the Acts.—The case of *Lederer v. Parker*, [1949] 2 All E. R. 443, decides an important point on the interpretation of section 9 of the 1920 Rent Act. Section 9, which contains the "normal profit" provisions affecting furnished lettings, applies where a person has let "any dwelling-house to which this Act applies". Where an attempt is made to construe this provision in conjunction with section 12 (2), proviso (i) of the 1920 Act, as amended by section 10 (1) of the 1923 Act, there appear to be three possible interpretations:—

- (a) That section 9 applies only where the value of the furniture is not sufficiently substantial to exclude the general provisions of the Acts.
- (b) That section 9 applies only where the value of the furniture is sufficiently substantial to exclude the general provisions of the Acts.
- (c) That section 9 applies whether or not the value of the furniture is sufficiently substantial to exclude the general provisions of the Acts.

The case of *Lederer v. Parker* has rejected the first of these interpretations. It was not necessary to decide between (b) and (c), and the report available at the moment does not show clearly whether the Court expressed any view as to whether (b) or (c) was the correct interpretation. The underlying reasoning seems to favour (b), and it is submitted that this is in fact the true view, and the only one which leads to a coherent construction of the Act. Otherwise it is difficult to reconcile the provisions as to normal profit with those as to standard rent (cf. *Bowness v. O'Dwyer*, [1948] 2 K. B. 219 at p. 230).

The difficulty is caused by section 10 (1) of the 1923 Act, which introduced the requirement of substantiality in connection with section 12 (2), proviso (i), of the 1920 Act, but did not make it clear how this affected section 9. If it is considered that the requirement of substantiality is not to be read into section 9, then we get a construction which is historically intelligible, but in practice unworkable.

In *Lederer v. Parker* the now familiar sequence of a reduction of rent by a 1946 Act Rent Tribunal, followed by an application to the County Court under section 9 of the 1920 Act to recover past over-payments, had taken place. The facts were that the dwelling-house in question was let at a rent which included payments in respect of both attendance and the use of furniture, and such payments constituted a substantial portion of the whole rent. The amount of attendance was, however, trifling, so that the part of the rent referable to the use of the furniture alone was itself substantial. In answer to a claim for overpayment of rent under section 9, the landlord contended (1) that section 9 did not apply because it only

applied to a dwelling-house to which the Act applies, and, by reason of section 12 (2), proviso (i), as amended by section 10 (1) of the 1923 Act, the Act does not apply where a substantial part of the rent is attributable to the use of furniture; (2) that section 9 only applies where the rent includes payments in respect of the use of furniture, not where it includes payments in respect of the use of furniture *and* something else, such as attendance. The Court of Appeal rejected both contentions.

As regards the landlord's first contention, the reasoning of the Court was as follows. Section 9 only applies to dwelling-houses to which the Act applies. Section 12 (2), as amended, defines such dwelling-houses as those whose rateable values fall within certain prescribed limits. Section 12 (2), proviso (i), as amended by section 10 (1) of the 1923 Act, excludes dwelling-houses let at a rent a substantial amount of which is referable to the use of furniture. There is, however, an exception to this exception, namely, cases where it is "otherwise expressly provided". This exception to the exception refers to sections 9 and 10 of the 1920 Act. Consequently, as the dwelling-house in question was within this exception to the exception, it was a dwelling-house to which the Acts "applied" for the purposes of sections 9 and 10, and, therefore, section 9 (1) applied to it. For a different purpose, namely, protection against eviction, the Acts did not apply to it.

The short answer to the second contention was that a rent none the less includes the use of furniture because it also includes some other element.

(Rent Restrictions Guide, 2nd ed., pp. 75-76, 79.)

Rent Restrictions Acts—position of administrator under section 12 (1) (f) of 1920 Act—administrator a person "deriving title" under the original tenant—doctrine of "relation back" inapplicable.—Two recent cases contribute to the elucidation of the position of an administrator of a deceased tenant of rent-restricted property. In *Harrison v. Hopkins*, [1949] 2 All E. R. 597, a contractual tenant, whose daughter had been living with him in the dwelling-house for some years, died intestate. His daughter took out letters of administration. There were five other children besides herself interested as beneficiaries in the deceased's estate. Notice to quit was served by the landlord on the daughter after the grant of administration had been obtained. In an action by the landlord for possession it was held by the Court of Appeal that the daughter, as administratrix, was a person who derived title under the deceased tenant and, as she was in occupation at the material time, she was entitled to the protection of the Acts. Bucknill, L.J., admitted that the decision had its difficulties, but thought that the wording of section 12 (1) (f) must prevail.

It will be remembered that in *Lawrance v. Hartwell*, [1946] 1 K. B. 553, it was held that the executrix of a deceased tenant came within section 12 (1) (f) and was entitled to protection. In that case the executrix happened also to be the universal legatee, but the Court expressed the view that the result would have been the same even if she had had no beneficial interest in the deceased's estate. This view has been criticised (see *The Rent Acts*, by R. E. Megarry, 4th ed., p. 77), but it is not easy to see how any other view can be reconciled with the plain words of the Act. The present decision is consistent with *Lawrance v. Hartwell*, and although it may have some odd consequences it is submitted with respect that it is correct. Any difficulties to which it may give rise should be considered by the Legislature when the Rent Acts are consolidated.

In *Long v. Burgess*, [1949] 2 All E. R. 484, the Court of Appeal rejected an attempt to apply the doctrine of "relation back", familiar in the law of administration of estates, in such a way as to enable a person, who only obtained a grant of administration after a notice to quit served on the President of the Probate, Divorce and Admiralty Division had expired, to claim the protection of the Rent Acts. The facts were that a contractual tenant, whose two sons had been living with her in the dwelling-house, died intestate. The landlord served notice to quit on the President, in whom the contractual tenancy had vested as a result of section 9 of the Administration of Estates Act, 1925. After the notice to quit had expired, one of the sons took out letters of administration. Such letters, indeed, were not taken out until after the landlord had started proceedings for possession, the County Court Judge having taken the extraordinary step of adjourning the County Court proceedings (to which the sons had no defence) in order to enable administration to be granted. He then decided, when the proceedings were resumed, that the doctrine of "relation back" applied, and that, notwithstanding that the notice to quit had expired, the contractual tenancy vested in the son as administrator. The son was, therefore, entitled to hold over as statutory tenant. The Court of Appeal reversed this decision. They held that the doctrine of "relation back" could not be used in this way to resurrect a tenancy which had expired. Asquith, L.J., pointed out that the true purpose of the doctrine was to protect and preserve the deceased's estate. He also criticised the action of the County Court Judge in adjourning the proceedings to enable administration to be obtained.

(Rent Restrictions Guide, 2nd ed., p. 11.)

Rent Restrictions Acts—land or premises let together with a dwelling-house—section 3 (3) of 1939 Act—land or premises to be treated as part of the dwelling-house—letting of flat with garage—no change of identity—standard rent of flat becomes standard rent of flat and garage.—Section 3 (3) of the 1939 Rent Act provides that any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house. Normally the standard rent which is applicable to the letting of the dwelling-house will also apply to a later letting of that dwelling-house together with additional land or premises which by virtue of section 3 (3) are to be treated as part of it. If, however, the additions are substantial enough to result in a change of identity, the old standard rent will no longer be applicable to the new entity thus created: *Hemns v. Wheeler*, [1948] 2 K. B. 61.

In *Langford Property Co., Ltd. v. Batten*, [1949] 2 All E. R. 422, this point was illustrated by the letting of a flat together with a garage situated some distance from it. The standard rent of the flat itself was £135 per annum; this was the rent at which it was let on September 1, 1939. At that date the garage was not let with it. In 1946 the flat and garage were let together for three years at a rent of £175 for the first two years, and £185 for the last year. The Court of Appeal held, affirming the County Court Judge, that the letting of the flat and garage together fell within section 3 (3) of the 1939 Act, and that the letting did not constitute a letting of a new entity but merely a letting of the old dwelling-house improved by the addition of the garage. There had been no change of identity, and, therefore, the old standard rent of £135 was applicable to the letting of the flat and the garage.

Asquith, L.J., agreed with his colleagues with some hesitation. According to *The Times* report, he felt difficulty in reconciling *Vaughan v. Shaw*, [1945] K. B. 400, and *Hemms v. Wheeler*, *supra*. Leave has been given to appeal to the House of Lords. As regards Asquith, L.J.'s difficulty, there appears to be an intelligible distinction between the two cases, the first being a case where two tenements previously let separately were later let as a single dwelling-house, and the second a case where additions and improvements had been made to a dwelling-house. In the first case there was a letting of a different entity; in the second there was not. It is true that the distinction, if pressed too far, gives rise to problems of an almost metaphysical nature. The meaning of identity, whether of the mind or of matter, has baffled the philosophers for centuries. Here again, however, common sense yields results more useful than the fine microscope of abstract analysis.

(Rent Restrictions Guide, 2nd ed., pp. 9 and 34.)

Breach of covenant to reinstate premises in condition prior to alteration—measure of damages at common law—whether Landlord and Tenant Act, 1927, applicable.—In *James v. Hutton and J. Cook and Sons, Ltd.*, [1949] W. N. 304, the Court of Appeal decided a point of some interest in relation to the measure of damages for breach of a covenant to restore premises to the state which they were in before an alteration sanctioned by the landlord. The case was one in which a sub-lease contained a covenant not to make any substantial alteration without the sub-lessor's consent. A licence was given to substitute a modern shop front for the existing one, on condition that the premises were restored at the end of the sub-lease to their original condition. The question which arose in the present proceedings was purely as to the measure of damages for breach of this covenant to restore. It was clear from the evidence that the sub-lessor, the plaintiff, would not in fact restore the premises to their original condition, and there was no evidence that the breach had resulted in any diminution in the value of the premises. The Official Referee awarded the plaintiff the substantial sum of £4,300, which was the probable cost of the work of restoration. He held (1) that the provisions of the Landlord and Tenant Act, 1927, did not apply to the case and that the measure of damages was determined by the common law; (2) that the measure of damages was the same as that which was applicable to the breach of a covenant to repair before the Landlord and Tenant Act, 1927, namely, the cost of restoration.

The Court of Appeal allowed an appeal from this decision. They held that the common law measure of damages for breach of a covenant to restore premises to their condition before alteration was not the cost of restoration but the damage actually suffered as a result of the breach. In their view there was no real analogy between breach of a covenant to restore, as in this case, and breach of a covenant to repair, for which the common law measure of damages (before the 1927 Act) was the cost of making good: *Joyner v. Weeks*, [1891] 2 Q. B. 31. Breach of a covenant to repair involves some damage to the landlord, whereas breach of a covenant to reinstate premises which have been altered (quite likely for the better) does not necessarily involve any injury. The Court of Appeal, therefore, awarded only nominal damages, namely, 20s.

The Court expressed the view, but without definitely deciding the matter, that section 19 (2) of the Landlord and Tenant Act, 1927, might well have enabled them to reach the same conclusion. The relevant part of that sub-section enacted that where there is a covenant against making improvements without consent, a proviso is to be implied that such consent

is not to be unreasonably withheld; this proviso does not include a requirement that the tenant shall reinstate the premises in their original condition if (a) such a requirement is reasonable, and (b) the improvement is not one which adds to the letting value of the holding. This enactment clearly implies that a requirement that the tenant shall reinstate is precluded if it is unreasonable, or if the improvement is one which does add to the letting value. The Court of Appeal expressed the view that "improvement" in this sub-section means an improvement from the tenant's point of view. They would have been prepared to decide, if it had been necessary, that the requirement in the present case was unreasonable, and they pointed out that there was no evidence whether the improvement did or did not add to the letting value. The view which they had reached in regard to the common law measure of damages for the breach of a covenant of this kind rendered it unnecessary for them to give a final decision on the application of section 19 (2). As Lord Goddard, C.J., said, however, it is difficult to see why section 19 (2) did not apply.

(Woodfall, 24th ed., pp. 724-725.)

Landlord and Tenant Act, 1927—measure of damages for breach of covenant to repair—injury to reversion—necessity for some evidence of actual damage to the reversion.—*Landeau v. Marchbank*, [1949] 2 All E. R. 172, does not break any new ground, but it illustrates in a useful manner the application of section 18 (1) of the Landlord and Tenant Act, 1927. In this case the question of damages for breach of a covenant to repair had been referred to a Master for report, and the present proceedings took place on a motion to vary the report on a matter of principle. The Master had properly excluded from his calculations the cost of such repairs as would be rendered valueless by a proposed conversion scheme, but had included the cost of such repairs as would not be so rendered valueless, notwithstanding the fact that no evidence had been tendered of any actual damage to the reversion. *Lynskey, J.*, following *Espir v. Basil Street Hotel, Ltd.*, [1936] 3 All E. R. 91, held that there must be some evidence of damage to the reversion, either in the form of evidence as to the value of the reversion without the repairs as compared with its value if the repairs had been done, or direct evidence of the effect of the state of repair upon the price realised. Accordingly, the Master's report, which placed a value of £148 5s. upon the "useful" repairs which remained after the effect of the conversion scheme had been considered, could not be supported. Judgment was given by *Lynskey, J.*, for nominal damages only for breach of covenant.

(Woodfall, 24th ed., pp. 724-725.)

Law of Property Act, 1925, s. 62 (1)—de facto use of coalshed enjoyed at the time of tenancy agreement—right passes under the tenancy agreement although not mentioned—fact that use is permissive immaterial.—*Wright v. Macadam*, [1949] W. N. 342, breaks no new ground but affords a useful illustration of the application of section 62 (1) of the Law of Property Act, 1925, to leases and tenancy agreements. Section 62 (1), it may be recalled, runs as follows:—

"A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages

whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

In *Wright v. Macadam*, for some time prior to the material tenancy agreement the tenants of a top-floor flat had enjoyed, by the landlord's permission, the right to use a shed in the garden for the storage of coal. The tenancy agreement in question, which was for one year only, made no reference to the coalshed. For some years after the date of the agreement the tenants continued to enjoy the use of the coalshed without question, and then the landlord refused to allow the use of it without an extra payment. The tenants brought an action for an injunction, a declaration of rights and damages. The County Court Judge decided in favour of the landlord on the ground that the right to use the shed was a mere revocable licence which could be withdrawn at any time. On appeal the Court of Appeal reversed this decision, on the ground that section 62 (1) applied. "Conveyance" in that sub-section included a "lease". An agreement under hand for one year was a "lease" as a result of section 52 (2) (d) and section 54 of the Law of Property Act, 1925. At the date of the letting the right to use the coalshed was a right *de facto* enjoyed with the flat, and, therefore, the conditions of section 62 (1) were satisfied. The fact that the use was permissive only was immaterial: *International Tea Co.'s Stores v. Hobbs*, [1903] 2 Ch. 165. The right in question was one which was known to the law.

It will be noted that the agreement was for one year only, and was, therefore, one which could be properly made under hand. It was decided in *Borman v. Griffith*, [1930] 1 Ch. 493, that section 62 (1) does not apply to an agreement for a lease exceeding three years.

(Woodfall, 24th ed., pp. 20, 212, 789.)

Forfeiture—acts amounting to waiver—routine demand for rent held not to amount to waiver—principles governing relief against forfeiture.—The case of *Creery v. Sommersell* (1949), 93 Sol. J. 357, affords useful illustrations of the principles governing waiver of forfeiture and relief against forfeiture. The plaintiff landlord had brought an action against both the lessee and the under-lessees for forfeiture for breach of covenant. The property consisted of offices, and the plaintiff had granted a lease to the first defendant, a surveyor and valuer, which contained covenants to use the premises demised as offices in connection with the lessee's business of a surveyor and valuer or for residence, and not to assign or underlet without licence. The first defendant under-let the premises to Messrs. Flowerdew & Co., Ltd., the law agents, the second defendants, without applying for consent. He was thus in breach of both covenants. A demand for rent was sent out as a matter of routine from the plaintiff's office after the breach, but without the plaintiff's actual knowledge. The cheque for rent when received was not, however, accepted, but returned.

Harman, J., held, first, that in the circumstances the demand for rent did not constitute a waiver of the forfeiture. The demand was sent out as a mere routine matter from the plaintiff's office without his own knowledge, and the cheque, when received, was returned. This does not mean that a duly authorised agent cannot waive a forfeiture. In the particular circumstances of the case the issue of a routine demand was not equivalent to the act of a duly authorised agent who had knowledge of the breach and was able to bind his principal. The case bears some resemblance to *Doe d., Nash v. Birch* (1836), 1 M. & W. 402. In that case, where a lessor was too

ill to attend to business, and it did not appear that he knew of a forfeiture, his son, who collected the rents, was held not to have authority to waive the forfeiture.

Harman, J., refused to grant relief against the forfeiture either to the first defendant, the lessee, or to the second defendants, the under-lessees. There was no equity in the first defendant to obtain relief. It would not have been unreasonable for the lessor to withhold his consent to an under-letting to the second defendants. The lease showed clearly that it was essential for the plaintiff to retain control of the third floor of the property. As regards the second defendants, the under-lessees, the head term ought only to be vested in them on the footing that they entered into covenants as stringent as those in the head lease, and this they would not do, as it would make the occupation useless to them. Relief must, therefore, be refused to them also, but they would be allowed a reasonable time to find other accommodation.

(Woodfall, 24th ed., pp. 926-932 and 932-945.)

Construction of clause in tenancy agreement—scope of indemnity to landlords—wider and narrower constructions—clause construed in favour of tenants.—Judicial constructions of particular clauses in tenancy agreements afford little help in the construction of other clauses in other agreements, but they are of some interest as showing the general direction in which the wind is blowing. The construction adopted by Streatfeild, J., in *John Lee & Son (Grantham), Ltd. v. Railway Executive*, [1949] 2 All E. R. 230, and approved by the Court of Appeal (*The Times*, July 29, 1949), shows a tendency to narrow in favour of the tenant the *prima facie* wide construction of an indemnity clause. The clause in that case ran as follows:—

“The tenant shall be responsible for and shall release and indemnify the company and their servants and agents from and against all liability for personal injury (whether fatal or otherwise) loss of or damage to property and any other loss damage costs and expenses however caused or incurred (whether by the act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created or anything done pursuant to the provisions hereof would not have arisen.”

This clause was set up by the Railway Executive, the landlords, in answer to a claim for damages by the tenants, whose goods had suffered damage by fire while stored in a railway warehouse. The warehouse, which was let to the tenants by the agreement in question, was adjacent to the railway, and the tenants alleged that the damage was caused by the landlords' negligence in allowing a spark to be emitted from an engine which set fire to the goods.

On a wide construction this clause would obviously have protected the landlords, but both Streatfeild, J., and the Court of Appeal decided that its language must be read subject to the qualification that the words “but for the tenancy hereby created” must be limited to damage arising out of or in connection with the tenancy or anything done in pursuance of the tenancy. Evershed, M.R., said that the point had given him very considerable difficulty, but that the wider construction would have extravagant results. The clause was not, therefore, sufficient to protect the landlords against a claim for damages upon the facts alleged by the tenants. In spite of the dictum of Jessel, M.R., in *Taylor v. St. Helen's Corporation* (1877),

6 Ch. D. 264, 270, that the maxim has no force at the present day, the present case seems to illustrate the principle of construction that "*verba chartarum fortius accipiuntur contra proferentem*".

(Woodfall, 24th ed., p. 200.)

Gratuitous installation of a defective boiler by landlord—no liability in tort to tenant's daughter—boiler not dangerous per se.—The decision in *Ball v. L. C. C.*, [1948] 2 All E. R. 917, mentioned in these notes in March, 1949 (p. 241), has been reversed by the Court of Appeal, [1949] 2 K. B. 159, although leave has been given to appeal to the House of Lords. Stable, J., had held the defendants liable in damages to their tenant's daughter, who had suffered severe injuries from a defective boiler gratuitously installed by the defendants during the tenancy. The ground of the Court of Appeal's decision, which follows *Malone v. Laskey*, [1907] 2 K. B. 141, was that the defendants owed no duty of care to their tenant's daughter, with whom they were in no contractual relationship, as the defective boiler (it had no safety valve) did not fall within the special category of things dangerous in themselves. The doctrine of things dangerous *per se* belongs to the law of tort, and it is not proposed to comment on it here. It seems fairly clear that *Malone v. Laskey*, which was binding on the Court of Appeal, governed the present case. If the matter goes further perhaps the House of Lords will rationalise a somewhat puzzling branch of the law.

(Woodfall, 24th ed., p. 714.)

5. FAMILY LAW CASES

By R. H. GRAVESON, Ph.D., S.J.D., LL.M., of Gray's Inn,
Barrister-at-Law

Nullity of marriage—jurisdiction—respondent domiciled and resident abroad—Casey v. Casey, [1949] 2 All E. R. 110.—This is the second case in a new line of precedents on annulment of voidable marriages, of which *De Reneville v. De Reneville* (a) was the first. The material facts in both cases were similar in that a wife, whose pre-marriage domicil and present residence were English, petitioned for annulment on the ground of wilful refusal of the husband, domiciled outside England, to consummate the marriage (b). The facts differed in that the marriage in *Casey v. Casey* was celebrated in England, a point on which counsel for the petitioning wife placed much reliance. What must, since the earlier case, be regarded as an irrelevant distinction for the purpose of jurisdiction was the additional fact that the later case was undefended. With a Court consisting as to two of its three members (Bucknill and Somervell, L.JJ.) of the same composition as that which heard the *De Reneville Case*, the decision in *Casey v. Casey* could hardly have been other than it was. The Court held that the mere fact of celebration of the marriage in England was insufficient to confer jurisdiction where the basis of the petition was impotence or wilful refusal to consummate. In such cases the place of celebration of the

(a) [1948] P. 100; L. J. R. 1761. The problems raised by this case were considered in *The Conveyancer*, March, 1948, pp. 185–202.

(b) In the earlier case the alternative ground of impotence was pleaded.

marriage was as irrelevant as in cases of divorce. This, however, left untouched the question of whether the residence of both parties in England at the date of institution of the proceedings would confer jurisdiction. The inference to be drawn from dicta in this case and its predecessor is that jurisdiction would be exercised on such a ground. Bucknill, L.J., referred to the question of whether the marriage as void or voidable should be decided by English or "Canadian" law, and would have allowed Canadian law to apply, as the law of the "matrimonial domicile", had any evidence of that law been given to the Court. The assumption that the law of a foreign matrimonial domicile is relevant in questions of annulment of marriage on a ground (wilful refusal to consummate) necessarily arising after the marriage, is a little difficult to reconcile with Bucknill, L.J.'s distinction of a case of nullity through incapacity to marry. He observed: "The essential difference, however, between *Sottomayor v. De Barros (c)* and the present case is that the marriage in the present case was valid in all respects so far as form and capacity were concerned. It is merely voidable because of the wilful refusal of the husband to consummate it (d). If the question of wilful refusal is neither one of form nor of capacity but, as we have long believed, simply a statutory ground for annulment, no sufficient reason seems to exist for reference to any foreign law to the exclusion of the English *lex fori*. The real test on this question has not yet come before the Courts, since in both cases the presumption operated that the relevant foreign law was the same as English. The wife's appeal was dismissed on the ground of lack of jurisdiction by analogy to the rule "that the court of the domicile of the husband is the sole court in dissolving a valid marriage" (*per* Bucknill, L.J., p. 117); though Bucknill, L.J., gave as a subsidiary reason the balance of hardship to the parties. On the strength of this case and its predecessor one may say with reasonable assurance that the only bases of jurisdiction to annul a voidable marriage are (a) the domicile of the parties in England, or (b) probably the residence of both parties in England, in either case at the institution of proceedings. But the two major problems remain of what law is to determine whether a marriage is void or voidable on the assumption that the ground alleged in the petition is true; and whether the English Courts in their recent attitude in favour of the matrimonial domicile would adhere to the principle of unity of domicile of husband and wife, even where the law of the matrimonial domicile gave to the wife a capacity to acquire a domicile of her own, and according to that law she had done so in England. A number of other points of interest arise on this decision which it would, perhaps, be inappropriate to consider in a brief note.

(Dicey, pp. 244 ff.)

Summary jurisdiction — maintenance — basis of ordinary residence — Macrae v. Macrae, [1949] 2 All E. R. 34.—The decision of the Divisional Court in this case (noted above, Vol. 13, p. 300) has now been affirmed by the Court of Appeal. The judgment of Somervell, L.J., contains an important statement on the acquisition and loss of ordinary residence. The learned Judge used these words (at p. 36): "Ordinary residence is a thing which can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place—in this case he left his wife; in another case he might have disposed of his house—and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place

(c) (1877), 3 P. D. 1; 47 L. J. P. 23.

(d) [1949] 2 All E. R. at p. 114.

which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place". The significance of this description of ordinary residence lies not only in questions of summary jurisdiction, but in the distinction which it connotes between the elements of domicile and residence.

(Cf. Latey, p. 364.)

Solemnisation of Mohammedan marriage in English private house—meaning of "marriage"—*R. v. Rahman*, [1949] 2 All E. R. 165.—In this case a Mohammedan had been indicted for purporting to perform a ceremony of marriage between two members of his faith, an Indian and an English woman, in a private house which had not been registered under the Marriage Act, 1836, for the solemnisation of marriages. The intended husband was already married to an Indian woman. The interest of this case, in which Streatfeild, J., held that the ceremony was intended as a marriage within the meaning of the Act of 1836, lies in his taking a little further the reasoning of Lord Greene (as Master of the Rolls) in *Baindail v. Baindail*, [1946] P. 122; 115 L. J. P. 65. "In these days", remarked Streatfeild, J., "it would be intolerable if we in this country were to refuse to recognise the validity of a Hindu [*sic*] marriage because polygamy is recognised under that faith and not under the faith of the Established Church of England" (at p. 168). In reaching his conclusion, the learned Judge resorted to the dual meaning of "marriage" in the statement of the offence of bigamy contained in section 57 of the Offences against the Person Act, 1861, but it is noteworthy that the Court of Appeal in *Baindail's Case* expressly excluded the bearing on the law of bigamy of any part of its judgment recognising a Hindu marriage.

(Latey, p. 9.)

6. ESTATE DUTY CASES

By L. J. STEIN, Barrister-at-Law

Estate duty—Finance Act, 1940, ss. 43 (2), 46 (1), 47 (1), 56 (1), 56 (2), 58 (5).—*Attorney-General v. St. Aubyn Estate, Ltd.*, [1949] T. R. 229, is the first reported case in which consideration has been given to the combined effect of section 43 (2) of the Finance Act, 1940, and section 56 of that Act. Section 43 is concerned with the determination of life interests. What it provides, briefly stated, is that the determination of a life interest will not prevent the property in which the interest subsisted from passing on the life tenant's death unless certain conditions are satisfied. These conditions are (1) that the life interest was determined three years before the death, and (2) that possession and enjoyment of the property in which the interest subsisted was assumed immediately thereafter by the person becoming entitled by virtue of or upon the determination and retained to the entire exclusion of the former life tenant and of any benefit to him. The exemption is subject to a qualification introduced by section 56. Subsection (2) of that section provides that, where a privately controlled company was concerned in the determination, or in associated operations of which the determination formed part, the condition of entire exclusion is to be treated as having been satisfied "if, and only if, it would have been so treated in the circumstances aforesaid". The last words refer back to subsection (1), the effect of which is that, where exemption is claimed under

section 3 of the Finance Act, 1894, by reference to a transaction for money consideration, and a privately controlled company was concerned in the transaction or an associated operation, the exemption is not to be given unless the Commissioners are satisfied that section 3 would have been applicable if the assets of the company had been held in trust for its members and the company had acted as trustee only, with power to carry on the business of the company. It will be noticed that, under sub-section (1), the question is whether the Commissioners are satisfied that the exemption would have been claimable in the circumstances supposed. On the other hand, the Commissioners do not figure in sub-section (2), and the question there is whether, "in the circumstances aforesaid", the conditions required for exemption under section 43 (2) would have been treated (by whom?) as satisfied. It is, therefore, no easy matter to produce a coherent picture out of the combined provisions of sub-section (1) of section 56, sub-section (2) of that section, and sub-section (2) of section 43, and it is no wonder that, in the *St. Aubyn Case*, above, Croom-Johnson, J., remarked that, "the inconvenience of this method of drafting . . . can hardly be over-emphasised". The learned Judge had some doubt as to the real effect of section 56 (2) in relation to section 43 (2), but came somewhat hesitantly to the conclusion that, however clear it might be that the Company in question did not hold its assets on trust for its members, he must deal with the question of exemption under section 43 (2) on the hypothesis that the Company's status was that of a trustee and not, as in fact it was, that of a beneficial owner. But on the facts of the *St. Aubyn Case*, above, this did not conclude the matter. The deceased had at one time a life interest in certain settled property. The property had been conveyed or transferred to a privately controlled company. The trustees had become the holders of the ordinary shares in the company and the deceased—the former life tenant—had become the holder of the preference shares. It might, therefore, look at first sight as though, on the hypothesis that the company's assets were held in trust for its members, the conditions of section 43 (2) were not satisfied. But the preference shares had been acquired by the deceased out of his own money, albeit money lawfully appointed to him out of the settled fund, before the determination of his life interest. The property in which the life interest subsisted immediately before the determination was not the preference shares but the ordinary shares held by the trustees, and from the time that the life interest was determined, these were held by the trustees to the entire exclusion of the deceased, the trust property having been, in effect, re-settled, by the exercise of a power of appointment, in such manner that no benefit was retained by the deceased. In these circumstances, it was held that, even on the hypothesis that the circumstances were such as appear to be described in section 56 (2), there was still no ground for saying that the conditions specified in section 43 (2) were not satisfied. There was an alternative claim to estate duty under section 46 of the 1940 Act, which deals with benefits derived by the deceased from a privately controlled company to which he has made a transfer of property. This claim also failed. The deceased had, as tenant for life, sold the settled property to a privately controlled company in exercise of his statutory powers under the Settled Land Act and of extended powers lawfully vested in him, as contemplated by the Act. It was held that this transfer of property was within the exemption contained in section 46 in favour of transfers effected by the deceased in a fiduciary capacity, and that the exemption was not destroyed by the restrictive provisions of section 58 (5), since the fiduciary capacity was not imposed upon the deceased by "a disposition made by him", but by section 107 of the Settled Land Act. A further point decided on this part of the case was that the definition of "benefits", in section 47 (1), as including "any periodical payment out of

the resources or at the expense of the company which the deceased received for his own benefit" cannot be taken to cover a series of mortgage loans repayable with interest.

7. INCOME TAX CASES

By L. J. STEIN, *Barrister-at-Law*

Income tax—charity—power to assist "charitable or benevolent" institutions—Income Tax Act, 1918, s. 37.—The decision in favour of the Crown in *The Oxford Group v. C. I. R.*, [1949] W. N. 37, provides one more illustration of the pitfalls to be avoided in framing a memorandum of association for a body which desires to benefit by the income tax concessions in favour of charities. What would ordinarily be regarded as the main object of the Oxford Group was undoubtedly a charitable object—the advancement of religion. But, unfortunately for the Association, additional objects were specified, and these included the exercise of a variety of powers, one of which was "to . . . support . . . any charitable or benevolent institution and to subscribe . . . money for charitable or benevolent purposes in any way connected with the purposes of the Association or calculated to further its objects". The list of powers ended with a power "to do all such things as are indicated or the Association may think conducive to the attainment of the above objects or any of them". It is trite law that objects which are "benevolent" are not necessarily charitable. On the construction of the memorandum, Croom-Johnson, J., could find nothing which required or warranted the treatment of the objects mentioned in the paragraph containing the list of powers as merely ancillary to those first specified in the objects clause. Regard must be had to the objects as a whole, and, looking at them as a whole, the learned Judge found it impossible to say that the Association was established for charitable purposes only.

[*Note.*—This decision has been affirmed by the Court of Appeal—see *The Times*, July 29, 1949.]

Reference may here be made to another recent decision in the same line of cases—*Polish Combatants Association v. C. I. R.*, [1949] T. R. 241. The question whether the Polish Combatants Association was established for charitable purposes only arose, not under section 37 of the Income Tax Act, 1918, but under section 52 (1) of the Stamp Act, 1947. There is, however, no difference between the two enactments in the tests to be applied in considering a claim to exemption for income tax or additional stamp duty, as the case may be, and in its attempt to show that the test was satisfied the Polish Combatants Association was in even more serious difficulties than the Oxford Group. The object first mentioned in the objects clause was "to promote the well-being, in the widest sense, of soldiers and ex-soldiers of the Polish Army". This was, in itself, so vague that it was at least highly questionable whether it amounted to a good charitable object. However that might be, the memorandum went on to specify further objects which were clearly fatal to the claim to exemption, as for example, "to afford to the beneficiaries or any of them opportunity for mutual acquaintance, social intercourse, association and co-operation", and "to print and publish" any newspaper or the like "that the Association may think desirable for the promotion of its objects", and even "to carry on any type of business that can properly and usefully be carried on in the course of the actual carrying out of the primary purposes of the Corporation". No wonder that Croom-Johnson, J., observed that "it might, perhaps, have been wiser if the Association had been content with a rather

narrower set of powers". Declining, as in *The Oxford Group Case*, to distinguish between main and ancillary objects, the learned Judge had no difficulty in deciding that the Association was not established for charitable purposes only. On the authority of *Verge v. Somerville*, [1924] A. C. 496, it was contended that the Association must be recognised as a charity because it was for the benefit of ex-soldiers, but the learned Judge declined, as might be expected, to accept this sweeping proposition, pointing out that no such generalisation could be founded upon *Verge v. Somerville*, which decided merely that a trust for the benefit of ex-soldiers was a good charitable trust in the particular circumstances of that case.

Income tax and surtax—property comprised in settlement—power to determine settlement—"power to enjoy"—whether "wife" includes widow—Finance Act, 1936, s. 18; Finance Act, 1938, s. 38.—In *Vestey v. C. I. R.*, [1949] 1 All E. R. 1108, the House of Lords has given an authoritative ruling on a number of hitherto doubtful points on the construction and application of some of the more baffling provisions of the anti-tax avoidance legislation—first, those of section 38 of the Finance Act, 1938, concerning revocable settlements and related matters, and, secondly, those of section 36 of the Finance Act, 1936, concerning the transfer of income to persons abroad. As to section 38 it was held first that, notwithstanding the wide definition of "settlement" in section 41 (4) (b) of the 1938 Act, the expression "the property comprised in the settlement" is to be construed by reference to the settlement property so called, as distinct from the transactions connected with and leading up to the settlement; "the property comprised in the settlement", said Lord Simonds, means "that property alone in which some beneficial interest is created". Secondly, the words "to revoke or otherwise determine the settlement or any provision thereof" are not to be given any extended or artificial meaning. Where, for example, as in *Vestey's Case*, the settled property consists of the rent receivable under a lease, a settlor cannot be said to have power "to revoke or otherwise determine the settlement or any provision thereof" because he has power to determine the lease. Thirdly, where a settlement gives the settlor power to direct the investment of the settled property or some part of it, this does not give him an "interest" within the meaning of sub-sections (3) and (4) of section 38, since, in the absence of express words to the contrary, the power must be taken to be a fiduciary power to be exercised in the interests of the beneficiaries, and not otherwise. Fourthly, in sub-section (4), above, the words "payable to or applicable for the benefit of the settlor . . ." connote, said Lord Simonds, "an out-and-out parting with the trust property or income by payment to the settlor in money or money's worth". They do not, therefore, cover any benefit which may accrue to a settlor from a power to direct the investment of the trust property, nor (it would seem) would they cover a loan to the settlor. These are the main points decided on section 38 of the 1938 Act. As to section 18 of the 1936 Act, it was made clear that, in order that the section may be applied, it must be shown, not only that the individual has "power to enjoy" within the meaning of one or other of the paragraphs of sub-section (3), but that he has that power by virtue of a right acquired by means of the transfer of assets or of the transfer plus "associated operations". Secondly, it was held that the right must be a right exercisable by the individual sought to be taxed; a right exercisable by that individual jointly with some other person will not suffice. Thirdly, light was thrown on the true construction of various paragraphs of sub-section (3), which defines "power to enjoy". Paragraph (a) deals with cases in which "the income is in fact

so dealt with . . . as to be calculated . . . to inure for the benefit of the individual". It was held that the Crown cannot rely on this paragraph unless it can point to an explicit finding of fact as to the manner in which the income was dealt with. Paragraph (b) deals with cases in which "the receipt or accrual of the income operates to increase the value of any assets held by him . . .". By sub-section (5) (b), "assets" includes "rights of any kind". It was held that, although the right to direct the investment of the trust property might well be an "asset", paragraph (b) has no application where the right is—as, in the absence of clear words to the contrary, it must be taken to be—a fiduciary right to be exercised in the interests of the beneficiaries. Paragraph (d) deals with cases in which "the individual has power . . . to obtain for himself . . . the beneficial enjoyment of the income". It was held that the words "beneficial enjoyment of the income" are to be given their natural meaning; "to say of a man who may direct that the trust income should be invested in a loan to himself [that he] has the beneficial enjoyment of that income is", said Lord Simonds, "a misuse of language". Lastly, as to paragraph (e)—"the individual is able . . . to control the application of the income"—it was held—again to quote Lord Simonds—that "these words point to an out-and-out disposal of the income for the benefit of some person or persons and are wholly inappropriate to an investment by way of loan". One further decision still to be mentioned deals with a point arising both under section 18 of the 1936 Act (see sub-section (5)) and under section 38 of the 1938 Act (see sub-sections (1), (2) and (4))—*viz.*, the construction of the word "wife". It was held that, in the case of both enactments, references to a wife are to be construed as not including a widow, and that the decision in *C. I. R. v. Gaunt* (1941), 24 Tax Cas. 69, must, accordingly, be treated as overruled.

Income tax—tax free annuity—res judicata by implication—Finance Act, 1941, s. 25.—The judgment of Roxburgh, J., in *Re Koenigsberg* (see *The Conveyancer*, January, 1949, *ante*, p. 234), has been reversed by the Court of Appeal, [1949] 1 All E. R. 804. The question at issue was one of *res judicata* by implication. The Public Trustee was the trustee of the will of a testator who died in 1941, having by a will made in 1936 bequeathed certain tax free annuities. The Public Trustee took out in 1943 an originating summons for the determination of certain questions arising under the will, the real point being, in effect, whether his income fee was to fall on the annuitant or on the other beneficiaries. The order made by the Court on the summons was made on the assumption that, having regard to the decision in *Re Waring*, [1942] Ch. 426, the annuities were reducible in amount under section 25 of the Finance Act, 1941, the will having been made in 1936. It was subsequently decided by the House of Lords in *Berkeley v. Berkeley*, [1946] A. C. 555, that the decision in *Re Waring*, above, was wrong, and that, where a tax free annuity was bequeathed by a will, the date to be considered for the purposes of section 25 of the 1941 Act was not the date of the will but the date of the testator's death. Hence, the annuities bequeathed by the testator in *Re Koenigsberg* would have been reducible if *Re Waring* had been good law, but turned out not to be reducible in the light of *Berkeley v. Berkeley*. The question which arose in *Re Koenigsberg* was whether the annuitants were entitled to their annuities in full or whether, by reason of the order made by the Court on the originating summons taken out by the Public Trustee in 1943, the case was one of *res judicata* by implication, and the annuitants were consequently estopped from raising the point. Differing from Roxburgh, J., the Court of Appeal decided unanimously that there was no such estoppel. Though the correctness

of the decision in *Re Waring*, above, had undoubtedly been assumed by the Court in making its order on the originating summons, the question of the application of section 25 of the Finance Act, 1941, was not raised in the summons, nor were the questions then before the Court of such a nature as to make it incumbent on the annuitants to raise the point on pain of being debarred from doing so in any subsequent proceedings. "The question whether an income fee is to fall on the annuitant or on the rest of the estate", said Lord Justice Somervell, "has nothing whatever to do with the question which arises under section 25". Accordingly, distinguishing *Hoystead v. Taxation Commissioners*, [1926] A. C. 155, the Court of Appeal held that the point was not *res judicata* and that the rights of the annuitants fell to be determined in accordance with the decision in *Berkeley v. Berkeley*.

THE LIBRARY

The Conveyancer's Deskbook, being the 20th edition of *The Practical Man*
By D. MACINTYRE, M.A., with Annuity Tables by H. W. McLELLAN.
London: Sweet & Maxwell, Ltd. 447 pp. (incl. index). (30s.)

This is a new and modernised edition of a book first published in 1836, then and hitherto known as *The Practical Man*. The present title more clearly indicates the nature of its contents; a miscellaneous collection of practical information and precedents for the conveyancer.

The book is arranged in alphabetical order, including titles on such matters as diverse as advowsons (a summary of the principles governing sales thereof), bailments, cognovits, a commentary on the 1925 property legislation, distress (the rules regulating the levying of a distress, and a list of the goods that are privileged from distress), a summary of the statutes relating to married women, death duties and stamp duties, etc. In addition to such abstracts of the law on a variety of conveyancing topics, some of which provide information not readily available in the ordinary textbooks, a number of precedents have been included. These seem to be excellent in themselves (we would particularly commend those relating to registered land, prepared by Professor Potter), but, with certain exceptions, we cannot quite appreciate the justification for their inclusion in a book of this type. The *Deskbook* could never, in our opinion, take the place of one of the standard sets of conveyancing precedents, such as *Key & Elphinstone*, and but few transactions could be covered satisfactorily by the few precedents included on, e.g., such matters as leases and wills. In the next edition, we would venture to suggest, these precedents on the "bread and butter" subjects of the conveyancer's practice might well be omitted, retaining, however, the useful precedents on the more out-of-the-way subjects, such as the forms of jurat, the notice not to trespass, and the form of complaint under the Small Tenements Recovery Act, 1838, etc.

The statements of the law seem to have been carefully and accurately prepared, and may be relied upon. Controversial points, as seems appropriate in a book of this nature, have been avoided, and there are no citations of cases. An excellent summary of the provisions of the Town and Country Planning Act, 1947, has been included in an appendix, but the usefulness of such a short statement is perhaps doubtful. No practitioner should rely for his knowledge of this Act on an abstract covering a mere six pages, and the rest of the book is hardly appropriate for a student or novice in the law.

A great deal of useful information will be found in this unusual little book, and the new edition would seem to have started it on a new lease of life; it is essentially a book for the conveyancer's managing clerk, and will no doubt find its way into most solicitors' offices. It is attractively produced, octavo in size, well printed, and adequately indexed.

J. F. G.

Notes on Chancery Practice. By F. G. R. JORDAN. Oyez Practice Notes No. 13. London: Solicitors' Law Stationery Society. (7s. 6d.)

Since we do not deal primarily with litigious matters in this Journal we hope that we shall not be suspected if we dismiss this little volume with the remark that it appears to be a remarkably clear account of the more elementary run of Chancery practice. It is extremely practical and should be in the hands of all but experienced Chancery clerks.

The Solicitors' Guide to Development and Planning. By R. N. D. HAMILTON, Solicitor. Oyez Practice Notes No. 14. London: Solicitors' Law Stationery Society. 131 pp. (7s. 6d.).

This book is based upon the learned author's articles in the *Solicitors' Journal* but contains, according to the Preface, much new matter. The book is written in a pleasant discursive style which makes it much easier to read than most of the issues on this topic. It avoids the transliteration of the Act and Statutory Instruments that is the curse of this type of literature. It is essentially practical with many references to official forms and such like, but it presents a clear and reasonably detailed picture of the control of development and how the landowner must cope with it. We would dismiss it without further notice by saying that anyone who wants to consider the position of the controlled landowner without tears should buy the book, were it not for the fact that there is a final section entitled Conveyancing Practice. As we understand the learned author neither the Minister of Town and Country Planning nor the Lord Chancellor (both of whom he cites) really understood the effect of the Bill they were introducing. They both thought that it created a "revolution in land tenure", but the learned author in eight pages explains that they are all wrong and that the revolution "will come with the next step, namely, nationalisation of the land, if and when it is taken" (p. 116). We wonder whether the learned author regards either the Statute of Uses or the 1925 Legislation as being revolutionary in their day? Why must we wait for nationalisation anyway?

The learned author also says (at p. 113) that "the Act has not taken away any property or right formerly vested in the owner". On the other hand that misguided body, the Central Land Board, have been advertising in the daily Press that the Act has *transferred* development values to the State, so presumably it has divested them from someone. But no doubt the learned Chairman of the Board is mistaken too.

From this beginning it is not to be expected of the learned author that he will demand drastic changes in conveyancing practice, but he does give some full and very valuable advice upon inquiries preliminary to contract. His difficulty really lies in the problem where the purchaser or mortgagee gets the wrong answer. Practical experience has shown that he *will* get the wrong answer and that given in good faith. Incidentally, this applies with a good deal of force to lessees too with the complication, not mentioned by the learned author, of deciding whether or not there is a warranty by the lessor for a particular use.

The real weakness of Mr. Hamilton's position is displayed if a careful analysis is made of the points he makes almost too unemphatically to strike the reader's mind. For instance, any specific matters under sections 23, 25, 26, 28, 29, 30 or 33 are to be recited and the conveyance is to be made subject to them, presumably because they are obligations or restrictions imposed by the Town Planning authority instead of by act of the party, *i.e.*, the use, other than temporary, on July 1, 1948. There is no true explanation of this distinction, since the restriction is treated by analogy to a Town Planning Scheme, which was an incumbrance anyhow. Again, *where there is any doubt* the parcels must be drawn so that the vendor is not committed to any particular use of the premises. The learned author takes the view that this sort of risk should be taken by the purchaser but like all those who take this view he does not really say why, or explain why conveyancers of this age should decline to make vendors give covenants for title to cover new difficulties (most of the old having been swept away) although their predecessors in title did otherwise.

Again the learned author does not see any necessity for any special covenant in leases in view of the usual covenants in leases preventing tenants from changing the use, etc. In our more limited experience covenants in leases so restricted are rare,

save in simple suburban cases; but apart from this a tenant covenants often enough to pay *inter alia* "assessments". Would this include the whole development charge for a development that might be valuable to the lessor, *e.g.*, a garage to a suburban house? But apart from this has the learned author never heard of defaulting tenants? One of the points of covenants covering such matters as planning contraventions, etc., is to enable the landlord to forfeit the lease, and in our experience a covenant dealing with only half the subject-matter is far more likely to lead to litigation than one covering the whole. We may have been somewhat unfair to our learned author. It is a good little book and well worth acquiring by all who have to advise landowners. In fact we are experiencing the same professional reactions as those which took place in 1925: a wild rush to get some information, some comforting reflections that it was not nearly as bad as was feared, a determination to part as little as possible from the old ways. Much that was valuable in the Acts was lost in many cases, and blunders are still being cleared up. Within recent months we have seen Abstracts of Title abstracting the whole of the transactions affecting a settlement in equity created after 1925 and the abstracting of wills proved after that date seems almost common form. It was not for this that the difficulties of the 1925 legislation were created. No doubt in most cases nothing happens. In most cases where the changes effected by the Town and Country Planning Act, 1947, are disregarded nothing will happen. In all conveyancing any number of blunders can be made and usually nothing happens—any experienced practitioner must know that. But what we are paid for—as a contributor to the *Daily Express* not long ago did not seem to realise—is for highly skilled advice and action *by way of insurance* against something going wrong. Solicitors who allow their purchasers, lessees or mortgagees to accept instruments which do not guarantee the use they thought they were getting, and in the two latter cases other things as well, are in danger of justifying charges that their costs are too high.

May we add one note. Before the learned author gives us his concluded view whether or not "use" is now a matter of title perhaps he would favour us with an examination (and clarification) of the somewhat numerous cases on the question "What is a matter of title?". He might even change his mind.

Modern Equity. Fifth Edition. By HAROLD GREVILLE HANBURY, D.C.L., Subrector and Senior Tutor of Lincoln College, Oxford; University Reader in Equity; of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1949. (40s.)

This is the fifth edition of this well-known work since 1935 and can, therefore, call for no extended review. It has apparently been carefully revised, though it would be a help to know the precise date. The Preface is just dated 1948, but some cases of that year have been included. This exceptionally well-written and suggestive book is primarily for students, but we have found it useful in practice though in no sense is it exhaustive. We can heartily recommend it, more particularly where the principle needs reconsideration.

An Index to the Law Quarterly Review, Volumes 1-64. By T. A. BLANCO WHITE, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1949. (25s.)

One of the great difficulties of periodical literature is the difficulty of finding matter for reference. This elaborate index should help to cure this defect so far as it concerns the *Law Quarterly Review*. Not only are the articles indexed but also the notes of cases and even reviews. But the difficulty is that the amount of material is so vast that it would be an almost herculean feat to index all the points of law that are raised and discussed in the course of the articles. It is significant that with roughly the same number of entries to a page the Index for 10 volumes of *The Conveyancer* (N.S.) is two-thirds as long as the Index for the 64 volumes of the *Law Quarterly*. In the longer articles at least all that can be hoped is to guess whether the point has in fact been taken and read the article. We should, however, be grateful for any guide to the wealth of learning contained in those 64 volumes.

Development Procedure under the Town and Country Planning Act, 1947.

By W. C. GRAPER, M.T.P.I., A.M.I.Mun.E., etc., Area Planning Officer
Hampshire County Council. London: Crosby Lockwood & Son, Ltd.
1949. viii and 141 pp. (8s. 6d.)

This is termed a "practical guide" and it sets out with practical detail the steps to be taken by those who wish to develop their land. It also deals with some other provisions affecting development and land values, such as previous planning control, unfinished buildings and enforcement of planning control. It is in no sense a law book but essentially a practical guide. The language is simple and the arrangement (it has no index) is simple and straightforward. From the point of view of the conveyancing lawyer it does not begin to answer the questions he wants to know, but for those who want to get the hang of control of development this is an excellent guide.

Dicey's Conflict of Laws. Sixth edition, under the General Editorship of

J. H. C. MORRIS, B.C.L., M.A., with Specialist Editors. London:
Stevens & Sons, Ltd., Sweet & Maxwell, Ltd. cxxix and 912 pp. 1949.
(£4 10s.)

The long-awaited sixth edition of Dicey's classic work is a worthy successor to those which have made this book the most respected and reliable authority on the English conflict of laws. If the editing has been more drastic than in previous editions, the need for drastic action has been greater; for the development, since the publication of the fifth edition seventeen years ago, of such important new subjects as foreign exchange control (to name only one of several problems in this field which have recently assumed major dimensions) has compelled the learned Editors to enrich this book by the addition of important new material. It is hardly necessary to add that existing matter has been brought up to date within the familiar framework of the late Author's Rules. The courageous experiment has been made of dividing the field of Dicey's great book among eight of this country's younger academic lawyers. Very great credit is due to the General Editor for co-ordinating necessarily individualistic views of a branch of law notoriously susceptible to a subjective approach, and to all the Specialist Editors for the spirit of co-operation which they have clearly shown.

This edition is not without its surprises, the first of which is on the cover. The change in title from *A Digest of the Law of England with Reference to the Conflict of Laws* to the more popular *Dicey's Conflict of Laws* not only raises the question of whether this should be a sixth or a first edition, but is mildly ironical in the fact that Dicey's contribution, direct and indirect, is far less in this than in any previous edition of the work. One's first impression of the book is that it is rather more academic, perhaps inevitably so, than its predecessors under the hand of Dicey or of Keith (a). In various places it shows, for instance, strong theoretical affiliation to the "local-law" theory of the late Walter W. Cook (b).

Most of that part of the book of particular interest to the conveyancer and property lawyer has been in the very capable hands of Mr. J. H. C. Morris, and is of a uniformly high standard. If the writer must disagree on a few points, it may be said that they are exceptional, though in one or two instances not unimportant. Many can be explained by the inconsistencies arising from the general retention of Dicey's Rules and the frequent rejection or qualification of his comment on them. A minor preliminary point of this nature arises on the question of *renvoi*, on which the Rule runs, "The law of a given country (i) means, when applied to England, the local or domestic law of England", a statement (at pp. 47-8) which is obviously too narrow to include a reference to English law under the "foreign court" theory of *renvoi* (called by the learned Editor the "total *renvoi* theory"), as his own illustration at the top of page 51 well shows. Mr. Morris is justifiably sceptical of the application of this doctrine to contracts (p. 55, note 96), though the Court of Appeal's decision in *Ocean S.S. Co. v. Queensland State Wheat Board* (c) might well have been mentioned in this connection.

(a) E.g., the discussion of the Incidental or Preliminary Question (pp. 73-76), particularly the final sentence.

(b) See, for example, pp. 531-534 (transfer of immovables).

(c) [1941] 1 All E. R. 153.

While fully acknowledging the existence of many unresolved problems in the conflict of laws, one would have wished that Rule 126 and Comment, by which the *lex situs* of a thing determines its nature as movable or immovable, had dealt also with the fundamental question of what law determines where a thing is situated? Unless one is to lose oneself in an interminable wrangle of *renvoi*, this question should be answered by the *lex fori*. There is no direct answer to the question of what is the *situs* of title deeds to English land deposited in a bank in country X, if by the law of X they are regarded as movables and, being by the law of England immovables, must logically be deemed situate in England; though the suggestion in the converse case of Scottish heritable bonds deposited in an English bank is that the *lex situs* of the land itself determines the nature of the bond (at p. 522), a sound conclusion which, however, seems to call for qualification of the Rule.

A striking feature of the English conflict of laws in recent years has been the expansion of the doctrine of the proper law from the narrow field of commercial contracts into wider spheres, such as marriage (d) and the validity of powers of attorney (e), while it has for long, under the guise of the search for a testator's intention, governed the construction of wills and priorities under them (f). But the proper law has not yet been formulated as a general principle of choice of law in fields other than that of contract, save possibly by Falconbridge, who uses the expression in the process of characterisation in the sense of the law which should govern any particular transaction (g). This absence of a more general formulation is noticeable in the new *Dicey*, particularly as the concept is extended to matters where its application may cause some surprise. Thus, it is said to govern the formal validity of a contract with regard to an immovable (p. 541). Again, Rule 129 (1), which states that a transfer of a tangible movable which is valid and effective "by the proper law of the transfer (*lex actus*)" and by the *lex situs* is valid in England, not only introduces the idea of proper law into these transactions without adequate judicial support, but also implies that the proper law and *lex actus* are necessarily synonymous (with which the writer respectfully disagrees) and in so doing departs from the definition of proper law in Rule 136 embodying the concept of the subjective intention of the parties, a definition on which the use of the expression throughout the book presumably depends.

The General Editor is not afraid of the unorthodox view when reason persuades him. Accordingly, he rejects the conventional idea that capacity to make an ante-nuptial marriage settlement is governed by the law of each party's pre-marriage domicile, preferring (though with hesitation) the proper law in its particular manifestation of the matrimonial domicile (at p. 790). Again, he refers personal capacity to make a will to the law of the testator's domicile at the time of making the will rather than at death (Rule 179, p. 818). Mr. Morris's emphatic views on the interpretation of the Wills Act, 1861, s. 3, already well known to the many users of his *Cases on Private International Law* (h), have found renewed expression in the expanded version of that section in which Rule 186 is formulated. His limitation of the effect of the section to British subjects and his interpretation of the adverse decisions of *In the Goods of Groos* (i) indicate an important departure from Dicey's opinion. The writer cannot share in this particular favouritism for the principle of nationality within a general field dominated by domicile.

Mr. R. Cross's editorship of those parts of the book dealing with the matrimonial jurisdiction of English and foreign Courts deserves much praise. One may sympathise with him in the difficulties which the decision of the Court of Appeal in *De Reneville v. De Reneville* (k) has caused, and applaud his gallant attempt to fit the anomalies of that decision into the traditional pattern of English precedent. But the general treatment of English nullity jurisdiction appears to the writer to have been unnecessarily confused through a failure to take first things first by distinguishing between void and voidable marriages *before* setting out, in Rule 35, six factual situations in which "the Court has jurisdiction to entertain a suit for a

(d) *De Reneville v. De Reneville*, [1948] P. 100.

(e) *Apt v. Apt*, [1947] 2 All E. R. 677, 679-680. See also, as to tort, note by J. H. C. M. in 12 M. L. R. 248 (1949).

(f) *Kelly v. Selwyn*, [1905] 2 Ch. 117.

(g) *Essays in the Conflict of Laws*, Chap. V, particularly p. 87.

(h) Pages 307-310.

(i) [1904] P. 269; 73 L. J. P. 82.

(k) [1948] P. 100.

declaration of nullity of marriage". Thus, for example, the reader almost inevitably receives the unfortunate impression that the English Court has jurisdiction to decree the nullity of a marriage, void or voidable (l) "(3) where the marriage was celebrated in England". Not all the major problems raised by the Court of Appeal in its recent decision are dealt with in *Dicey*, but those that are considered have received an inspired treatment. In passing, it may be mentioned that *Roberts v. Brennan* (m), which is apparently treated as an authority (at p. 254), was overruled by the Court of Appeal in *De Reneville's Case*.

The writer must apologise to the other learned Specialist Editors—Mr. Cowen, Dr. Kahn-Freund, Mr. Lipstein, Mr. Parry, Mr. Welsh and Professor Wortley, whose notable contributions to the new *Dicey* he has not been able, through lack of space, to review. Every one of them has given of his best to make of this edition a book of the greatest value to the practising lawyer and the student. As an experiment in team-work of the highest character the new *Dicey* is an unqualified success. But in welcoming this book it is not unfitting to note, with satisfaction or regret, that much of what we knew as *Dicey* has gone. The skeleton, in the shape of the Rules, is substantially retained, but the flesh and blood of the explanatory comments are vastly changed. In this sense, at least, we may bid farewell to one of the greatest architects of the English conflict of laws.

R. H. GRAVESON.

A Guide to the Landlord and Tenant (Rent Control) Act, 1949. By J. MUIR WATT, M.A., Barrister-at-Law. (ix and 86 pp.) London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. (6s. 6d. net.)

This book, which is No. 7 in the Current Law Guide Series, is written by Mr. J. Muir Watt, the author of two previous Guides, those on the Agriculture Act, 1947 and the Agricultural Holdings Act, 1948. The eighteen sections and two Schedules of the new Act are expanded into 81 pages of text. The author makes a practical approach to his subject and seeks not only to explain the effect of the new statute, but also to set it in its correct background of the law existing before the present Act. Unfortunately, the Legislature did not have the time or the courage to seize the opportunity of consolidating the law which regulates such a fundamental relationship as that of landlord and tenant. Hence, we now have yet another Act to consider when examining the principles governing this vital subject.

In writing a guide of this type, which seeks to amplify and explain a statute, there is always a fear that the author, in his anxiety to avoid producing a mere annotated edition of a King's Printer's copy, may be tempted to paraphrase the words of the statute too often or even too widely. Mr. Muir Watt avoids this pitfall and does not hesitate to quote the actual wording of the Act frequently. Further, he has attempted to anticipate the difficulties which may arise from the involved provisions of this Act, e.g., as to the prohibition of premiums, and has tried to clarify the application of such provisions by means of examples. Thirteen of these are given and they should prove very helpful in understanding the operation of parts of the Act where the bare wording without illustration tends to be confusing. Similarly, the author has tried to foresee cases where the interpretation of sections may give rise to difficulty, e.g., section 2 (3), and has put forward reasoned arguments why one suggested interpretation is probably preferable to others.

Although the author claims that his comments are elucidatory rather than polemical, he has permitted himself to be critical of the form of the Act when he considers it necessary. The Guide is divided into five parts, Houses Let for the First Time since September 1, 1939, Prohibition of Premiums, the Sharing of Accommodation, Sub-lettings of Part of the Premises, Amendments of the Furnished Houses (Rent Control) Act, 1946, and Miscellaneous. The Landlord and Tenant (Rent Control) Regulations, 1949 (SI 1949, No. 1096) are given as an appendix.

R. DAVISON.

(l) See *The Conveyancer*, March, 1948, p. 186.

(m) [1902] P. 143.

Local Land Charges. By J. F. GARNER, LL.M., Solicitor. London: Shaw & Sons, Ltd. 1949. ix and 136 pp. (12s. 6d.)

As the title of the work implies, this book deals with matters registrable in Local Land Charges Registers. It is thought that it will be of considerable value to the Registrars responsible for keeping such registers, and to their clerks, and it should also be of occasional use to practitioners. It is perhaps hardly fair to suggest that the work might usefully have been extended to land charges generally, though it is a fact that the average practitioner is faced much more often with problems concerning the registration of land charges other than local land charges.

The following points might perhaps be considered in connection with any further edition:—

- (1) P. 47—Endorsement of title deeds as an alternative to registration in Part IV of the Register in respect of rights conferred by virtue of section 12 of the Requisitioned Land and War Works Act, 1948, might usefully have been mentioned.
- (2) P. 62—Not all matters which are registrable in the Local Land Charges Register are local land charges, strange as this may seem. For example, although a compulsory purchase order made under the Town and Country Planning Act, 1947, is so registrable it is not a local land charge. The rules made under that Act do not incorporate section 17 (3) of the Land Charges Act, 1925; nor do they incorporate the latter part of section 15 (1) of that Act. Other examples could be given. Hence it is incorrect to say that non-registration renders *any* registrable charge void against a purchaser (see p. 62, lines 1-3).

Apart from a few matters of this kind and some slips, such as a reference on p. 12 to Rule 15 (2) instead of Rule 16 (1), the work has been well done, and the author is to be congratulated upon collecting a great deal of complicated and scattered material, and re-arranging it under suitable headings in a clear and lucid form. He seems, however, to have been unduly shy of giving details concerning the judicial decisions to which he refers in the footnotes.

E. O. W.

Local Land Charges. By C. K. PHILLIPS, M.A., being No. 8 of "Oyez Practice Notes". Published by The Solicitors' Law Stationery Society, Ltd. (2s. 6d.)

This little book on a small but complicated subject of increasing importance will be of assistance to busy practitioners. The author explains, by reference to the Local Land Charges Rules, 1934 (and the subsequent amendments thereto), the contents of the respective parts of the Register, and summarises briefly the nature of local land charges in general. Useful paragraphs are included on the effect of a registered charge as between vendor and purchaser, and the important question of the additional information that should be requested from the local authority is also dealt with.

As your reviewer has remarked elsewhere, the effect of the Town and Country Planning Act, 1947, and the nature of the charges that may arise thereunder has not been discussed as fully as might have been wished, but this is perhaps unavoidable in a booklet of this size. It is also suggested that mention might have been made of the circumstances in which certain registrable but unregistered local land charges may be enforced against a purchaser, even for value, as it is not always appreciated by practitioners that such contraventions of the general principle of section 15 (1) of the Land Charges Act, 1925, may be possible.

The pamphlet is, however, well worth its modest price, and we would particularly commend the final section, giving a very helpful Summary of Procedure.

J. F. G.

Jackson's Agricultural Holdings. Tenth edition. By W. HANBURY AGGS, M.A., LL.M. London: Sweet & Maxwell, Ltd. xviii and 508 pp. 1949. (£2.)

A new edition of *Jackson* is an event of importance to all who are professionally concerned with agricultural land. *Jackson* is used not only by lawyers but by all the leading tenant-right valuers. A copy of *Jackson* has for long been a familiar sight at an agricultural valuation.

The editor of a leading textbook who brings out a new edition after the law has undergone far-reaching amendment is in a difficult position. If his revision is too drastic he may be accused of jettisoning the accumulated wisdom of the past. If he preserves as much as possible of the old learning he may be charged with ultra-conservatism and timidity. Mr. Hanbury Aggs, who has unrivalled qualifications in this branch of the law, has decided that on balance the conservative approach is the better. This has the advantage of showing the continuity between the old and the new law, but there may be some readers who will feel that the important innovations introduced by the Agriculture Act, 1947, and now embodied in the Agricultural Holdings Act, 1948, justify bolder methods of revision than the learned editor has adopted. Perhaps some of the older generation of readers will be reassured when they find that so much of the old familiar landscape is apparently preserved. They would do well to realise that although much remains familiar there is much that is new and strange.

Mr. Aggs has preferred, on the whole, to await judicial interpretation of the new provisions which have already given rise to doubts and problems in practice. One sometimes wishes that he had ventured more frequently to express his own opinion, as he does on p. 143 in regard to the effect of the tenant's failure to serve notice requiring arbitration under the Agriculture (Control of Notices to Quit) Regulations, 1948.

It is inevitable that in a work of this kind some statements should occur with which not all readers will agree. For example, the statement at the foot of page 72 of the effect of section 34 (4) of the 1948 Act appears to be somewhat misleading; both the conditions mentioned require to be fulfilled before the tenant's compensation for disturbance is limited to the part of the holding affected by the notice. Again, the criticism on page 122 of the latter part of section 10 seems to the present reviewer rather unjustified. There are a few clerical errors. The last sentence but one in the second paragraph of page 45 requires amendment. The reference on page 77 to Article 11 (2) of the Agriculture (Areas for Agricultural Land Tribunals) Order, 1948, should be to the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1948. Something has gone wrong with the commentary on section 73, which appears on p. 197; part of the note here should apparently be appended to section 82 (2).

The book contains the text of the main statutory instruments which affect agricultural holdings, and the useful manual of tenant-right valuation has been brought up to date. The statutory and non-statutory forms have been revised.

Lawyers concerned, whether frequently or occasionally, with agricultural holdings will wish to obtain a copy of the tenth edition of *Jackson* to replace the ninth in their bookshelves.

J. M. W.